Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

ED J. MIRELES, AND PAUL J. ROA,
Petitioners,

v.

UNITED STATES OF AMERICA, AND CHARLES M. CARBERRY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a charge under a union constitution, against an elected union official for conditioning the employment of appointive union administrators on their making late payments and thus becoming ineligible to run in union elections, preempted by the LMRDA and the federal interest in not restricting the exercise of the right of an elected union official to terminate appointive union administrators, and in light of the fact that this Court has found this right to be an integral part of ensuring a union administration's responsiveness to the mandate of a union election?

2. Under the "substantial evidence" standard of review, must a Court of Appeals reverse a conclusory opinion by an agency that fails to provide a rationale for crediting or discrediting testimony?

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ED J. MIRELES, AND PAUL J. ROA,
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UNITED STATES OF AMERICA, AND CHARLES M. CARBERRY,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Ed J. Mireles and Paul J. Roa pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on October 23, 2002, and published on January 2, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit has been ordered published but has not yet been reported in the Federal Reporter. It is reprinted in the appendix hereto, App. A, p. 1a, *infra*. The memorandum and order of the United States District Court for the Southern District of New York granting the Independent Review Board's application to affirm its opinion and decision has not been reported and is reprinted in the appendix hereto, App. B, p. 8a, *infra*. The

opinion and decision of the Independent Review Board has not been reported and is reprinted in the appendix hereto, App. C, p. 14a, *infra*.

JURISDICTION

The Second Circuit entered an unpublished summary order on October 23, 2002, and published that order on January 3, 2003. *See* App. A, pp. 1a, 2a n.1.

This Court has jurisdiction to review the judgment of the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

See App. D, p. 51a, *infra*.

STATEMENT OF THE CASE

Petitioner Ed J. Mireles ("Mireles") served as elected Secretary-Treasurer of Local 952 ("the Local") of the International Brotherhood of Teamsters ("the Teamsters" or "IBT") from 1989 until 1999. Petitioner Paul J. Roa ("Roa") served as an appointive business agent of the Local at the relevant times. On April 17 and 18, 2000, the Independent Review Board ("IRB") established under a consent decree entered against the Teamsters in the same action held a hearing on certain charges against Petitioners. Petitioner Mireles was charged with having "brought reproach upon the IBT" in violation of the IBT constitution by (1) having "required [appointive] Business Agents to fail to make a month's dues payment in a timely manner, thereby making them ineligible to run for office in a Local Union officer election" under the IBT constitution and the Local bylaws; and (2) having "failed to cooperate with the IRB" by falsely testifying before the IRB regarding the practice described in (1). App. C, pp. 15a-16a. Petitioner Roa was charged with "having brought reproach upon the IBT" in violation of the IBT constitution by having "aided and abetted" the practice described in (1). *Id.* at p. 16a.

Following the hearing, on October 17, 2000, the IRB found that Petitioners had brought reproach upon the IBT as alleged in the charges against them. The IRB barred Mireles and Roa "from holding the position as an officer in the IBT or any related entity" for periods of seven and four years, respectively, and suspended them from IBT membership for periods of four and two years, respectively. *Id.* at p. 50a.

On February 21, 2001, the United States District Court for the Southern District of New York, by memorandum order, found that "substantial evidence" supported the IRB's findings of fact and that the sanctions imposed by the IRB were proportionate to the severity of the misconduct of which Petitioners were guilty. *See* App. B, pp. 12a-13a. The district court had jurisdiction under 28 U.S.C. § 1331 because the consent decree that established the IRB resulted from an action brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

Petitioners appealed to the United States Court of Appeals for the Second Circuit. On October 23, 2002, the Second Circuit affirmed the order of the district court. *See* App. A, pp. 2a n.1, 7a.

Petitioners now seek a writ of certiorari in this Court because (1) in one important aspect, the decision by the Second Circuit conflicts with decisions by this Court, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of California; and (2) in another important aspect, the decision by the Second Circuit conflicts with a decision by the United States Court of Appeals for the Sixth Circuit.

First, in *Finnegan v. Leu*, 456 U.S. 431 (1982), this Court found the right of an *elected* union official, such as Petitioner Mireles, to terminate *appointive* union administrators, such as the business agents, to be an integral part of ensuring a union administration's responsiveness to the mandate of the union

election and, therefore, of furthering the overriding objective of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. §§ 401 *et seq.* Accordingly, this Court held that an appointive union administrator could not state a claim against an elected union official for termination in violation of the LMRDA. In *Bloom v. General Truck Drivers, Office, Food & Warehouse Union*, 783 F.2d 1356 (9th Cir. 1986), the Ninth Circuit indicated that with narrow exceptions not applicable in the present case, a state claim for wrongful discharge, other than e.g. one for discharge in retaliation for refusal to engage in an illegal act, would be preempted by the LMRDA and *Finnegan*. In *Screen Extras Guild, Inc. v. Superior Court*, 800 P.2d 873 (Cal. 1990) (in bank), the Supreme Court of California, sitting in bank, held that such a claim was indeed preempted by the LMRDA.

The Second Circuit's decision in the present case conflicts with *Finnegan*, *Bloom*, and *Screen Extras Guild*. If an elected union official may not only terminate an appointive union administrator for any reason without facing possible liability under the LMRDA, as *Finnegan* held, but may also do so for political reasons without facing liability under state law for wrongful discharge, as *Bloom* indicated and *Screen Extras Guild* held, then Petitioner Mireles could not only condition the employment of the business agents on their foregoing eligibility to run in union elections without facing liability under the LMRDA, but he could also do so without facing liability under state law for wrongful discharge and, by the same token, under the IBT constitution for bringing "reproach" upon the IBT. In other words, just as the LMRDA preempted the action under state law in *Screen Extras Guild*, it also preempted the charges under the IBT constitution in the present case. To give the LMRDA its proper preemptive reach, this Court should, therefore, reverse the Second Circuit's affirmation of Petitioners' convictions on these charges.

Second, even if the charges against Petitioners were not preempted by the LMRDA, this Court should nevertheless reverse the Second Circuit's affirmation of Petitioners' convictions because the Second Circuit's credibility ruling in this case conflicts with that of the Sixth Circuit in *Director, Office of Workers' Comp. Programs v. Congleton*, 743 F.2d 428 (6th Cir. 1984). In *Congleton*, the Sixth Circuit held that a conclusory opinion that fails to provide a rationale for crediting or discrediting testimony does not warrant affirmance. There is no question that the IRB credited testimony that was disfavorable to Petitioners and discredited testimony that was favorable to Petitioners, in some instances providing only conclusory rationales for doing so and in other instances without providing any rationale, conclusory or otherwise. Under *Congleton*, the IRB's decision therefore did not warrant affirmance. The Second Circuit nevertheless affirmed. This Court should grant a writ of certiorari to resolve the conflict between the Sixth Circuit's decision in *Congleton* and the Second Circuit's decision in the present case.

ARGUMENT

I. THE COURT OF APPEALS' PREEMPTION RULING IN THIS CASE IS NOT ONLY CONTRARY TO THIS COURT'S RULING IN *FINNEGAN*, BUT IT CONFLICTS WITH THE OPINIONS OF THE NINTH CIRCUIT IN *BLOOM* AND THE SUPREME COURT OF CALIFORNIA IN *SCREEN EXTRAS GUILD*.

In *Finnegan*, this Court held that an appointed union employee who is also a union member cannot state a claim for violation of the LMRDA for being discharged by an elected union official. As the reason for this holding, the Court stated that "the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election" and was thus necessary to serve "the Act's

overriding objective." 456 U.S. at 441. Under *Finnegan*, Petitioners' alleged conduct was protected from prosecution under the LMRDA. The Second Circuit nevertheless held that Petitioners could be prosecuted for that conduct under the IBT constitution. *See* App. A, pp. 3a-5a. But in *Bloom*, the Ninth Circuit indicated that a state claim for wrongful discharge, other than *e.g.* one in retaliation for a refusal to engage in an illegal act, would be preempted by the LMRDA and *Finnegan*. And in *Screen Extras Guild*, the Supreme Court of California, sitting in bank, held that such a claim was indeed preempted by the LMRDA and *Finnegan*. By the same token, the charges against Petitioners for violation of the IBT constitution were also preempted by the LMRDA and *Finnegan*, and the Second Circuit's affirmance of Petitioners' convictions on these charges must be reversed.

A. Under *Finnegan*, Petitioners' Alleged Conduct Was Protected from Prosecution Under the LMRDA.

The Second Circuit affirmed the IRB's finding that Petitioners brought "reproach" upon the IBT, in violation of the IBT constitution, by "institute[ing] a policy requiring IBT members who served as [appointive] business agents of the local union to make dues payments on an untimely basis," thus rendering them "ineligible to run for a local office position." App. A, pp. 2a-3a. Initially, it must be observed that Petitioner Mireles could not have "required" his business agents to make late dues payments. Nor is there any evidence in the record that he did so. At most, Petitioner Mireles allegedly gave his business agents a choice: Make late dues payments—and become ineligible to run in union elections—or lose your appointive job with the union. *See also id.* at p. 5a (Second Circuit characterizes the alleged conduct as merely "the conditioning of union employment on relinquishment of a membership right," i.e., the right to run in union elections); *infra* note 1. As discussed below, under

Finnegan, such a "forced choice between expressing one's opinion [by running in union elections] and losing one's job" is merely "[a]n indirect burden on membership rights" that "is insufficient to state an LMRDA claim." *Bloom*, 783 F.2d at 1359 (citing *Finnegan*, 456 U.S. at 440-42).

In *Finnegan*, Harold Leu had defeated incumbent Omar Brown in an election for the presidency of a IBT local. *See* 456 U.S. at 433. Upon taking office, Leu discharged the locals business agents, all of whom had been appointed by Brown and had openly supported him in the election. *See id.* The discharged business agents filed suit against Leu, alleging violations of the LMRDA, specifically, 29 U.S.C. §§ 411(a)(1), 411(a)(2), 412, 529. *See* 456 U.S. at 434; *see also* App. D, p. 51a-52a.

This Court rejected the claims of the discharged business agents. The Court found the issue of union patronage addressed in neither the language nor the legislative history of the LMRDA and "th[ought] it virtually inconceivable that Congress would have prohibited the longstanding practice of union patronage without any discussion in the legislative history of the Act." 456 U.S. at 441 & n.12. Moreover, prohibiting union patronage would have thwarted "the Act's overriding objective," *i.e.*, "to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Id.* at 441. The Court observed: "Far from being inconsistent with this purpose, *the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election*." *Id.* (emphasis supplied). The Court concluded, therefore, that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id*; *see also Franza v. Int'l Bhd. of Teamsters*, 869 F.2d 41, 45 (2d Cir. 1989) ("The overriding purpose of promoting union democracy and

political accountability established by the Act would be thwarted were an elected union leader unable to 'choose a staff whose views are compatible with his own'" (quoting *Finnegan*, 456 U.S. at 441)); *Bloom*, 783 F.2d at 1361-62 ("The federal interest in promoting union democracy and the rights of union members . . . includes an interest in allowing union leaders to discharge incumbent administrators").

The Seventh Circuit, the Ninth Circuit, and the California Supreme Court subsequently clarified that elected union officials have the right to discharge appointed administrators not only *after their initial election*, but also *after their reelection* and, as is crucial in the context of the present case, *before their reelection*. *See Brunt v. Service Employees Int'l Union*, 284 F.3d 715, 718-20 (7th Cir. 2002) (administrators who challenged incumbent president in election, supported challenger, or stayed neutral were fired after incumbent's reelection); Bloom, 783 F.2d at 1359, 1362 (administrator who refused to illegally alter minutes of union meeting was discharged by president who believed administrator intended to run against him in upcoming election); *Screen Extras Guild*, 800 P.2d at 881 (noting that "the potential for a staff member to impede implementation of union officials' programs does not automatically decrease or evaporate with the passage of time" and that "[t]he recency of the union elections in *Finnegan* . . . simply has no bearing on the applicability of th[at] case[] to this one"). Thus, an elected union official such as Petitioner Mireles has the right to discharge an appointed administrator at any time during his tenure, and for whatever reason.

There is, therefore, no question that Petitioner Mireles could have simply discharged his business agents without violating the LMRDA. Instead, he allegedly gave them a choice: Make late dues payments—and become ineligible to run in union elections—or lose your appointive job with the union. This is precisely the type of "union patronage"

sanctioned by this Court in *Finnegan* as "an integral part" of ensuring the LMRDA's "overriding objective" of "ensuring a union administration's responsiveness to the mandate of the union election." 456 U.S. at 441. It is a fair assumption that an appointed business agent who is not willing to forego the right to challenge his elected superior in a future election may even now be unwilling to carry out the policies of this superior and may thus not be "responsive[] to the mandate" from the union members who elected this superior. Under *Finnegan*, Petitioner Mireles therefore had the right to exclude this possibility by allegedly giving his business agents a choice to make themselves ineligible to run in union elections or forego employment with the union.

In fact, in *Parini v. Int'l Bhd. of Teamsters*, 568 F. Supp. 1246 (N.D. Ill. 1983), *aff'd*, 749 F.2d 34 (7th Cir. 1984), the United States District Court for the Northern District of Illinois held, and the Seventh Circuit affirmed, that a similar "scheme" did not violate the LMRDA. In that case, IBT officials persuaded IBT member Emil Parini not to run for union office by promising to appoint him after the election as business agent if he did not run. *See* 568 F. Supp. at 1247. Parini did not run and the union officials kept their promise and appointed him as business agent. *See id.* This "scheme" was repeated a second and a third time. *See id.* The fourth time, however, the union officials broke their promise and discharged Parini after the election although he did not run. *See id.* Parini filed suit, claiming that he was "effectively deprive[ed] . . . of the opportunity to run for [u]nion office," in violation of the LMRDA. *Id.* at 1248.

The Northern District of Illinois disagreed because Parini was not "*involuntarily* deprived of his opportunity to run for [u]nion office." *Id.* (emphasis supplied). Instead, Parini "*willingly* . . . relinquished his opportunity to be a candidate time and again in return for . . . renewal of his [u]nion employment." *Id* (emphasis supplied). The union officials'

offer "did not preclude Parini from exercising his rights under the Act." *Id.* at 1249 n.5. Rather, it merely put Parini to a choice similar to that faced by the petitioners in *Finnegan*. *See id.* In fact, whereas the petitioners in *Finnegan* faced a "dilemma" because "if they refuse to campaign for the incumbent they risk his displeasure, and by supporting him risk the displeasure of his successor," 456 U.S. at 442, "the options available to Parini were far less a Hobson's choice than those in *Finnegan*," 568 F. Supp. at 1249 n.5.

Similarly in the present case: Petitioner Mireles' business agents were not involuntarily deprived of their opportunity to run for union office. Instead, they willingly made late dues payments—and thus became ineligible to run in union elections—in return for continued union employment.[1] Petitioner Mireles moreover did not preclude his business agents from exercising their rights under the LMRDA Instead, he allegedly put them to a choice similar to—but far less of a Hobson's choice than—that faced by the petitioner in *Finnegan*. If Petitioner Mireles indeed put his business

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[1] The Court of Appeals therefore erred when it suggested that *Finnegan* and *Bloom* were distinguishable because "[h]ere, the business agents were deprived of their rights as members to run for election to union office." App. A, p. 5a (quoting *United States v. Int'l Bhd. of Teamsters* ("*Carey*"), 156 F.3d 354, 361 (2d Cir. 1998) for the holding that the "act of making a person ineligible to seek union office 'affects him as a member' under federal labor law"). It is, however, *Carey*, not *Finnegan* and *Bloom*, that is distinguishable from the present case. In *Carey*, an election officer disqualified former IBT General President Ron Carey, *against his will*, from standing for office in a rerun of the annulled election that first brought him to office. *See* 156 F.3d at 358. By contrast, in the present case, Petitioner Mireles' business agents *willingly* disqualified themselves from eligibility to run in union elections by making late dues payments. That Petitioner Mireles allegedly asked them to do so is of no importance, even if they would have lost their appointive office had they refused to disqualify themselves from the elections, just as it was of no importance that the plaintiff in *Parini* never would have gotten his appointive office had he refused not to run in the election.

agents to this choice, he no more violated the LMRDA than did his counterpart in *Finnegan*. Rather, he exercised a right under the LMRDA, and, as discussed in the next section, the LMRDA preempts prosecution not only under state law but also under the IBT constitution for the exercise of this right.

B. Under *Bloom* and *Screen Extras Guild*, Because Petitioners' Alleged Conduct was Protected from Prosecution under the LMRDA, It Was also Protected from Prosecution Under the Teamsters Constitution.

Although Petitioners' alleged conduct was, as discussed in the previous section, protected from prosecution under the LMRDA, the Second Circuit nevertheless held that Petitioners could be prosecuted for that conduct under the IBT constitution. *See* App. A, p. 5a ("The issue here is not whether the business agents have an actionable claim for impairment of their membership right to stand for election [in violation of the LMRDA], but whether the conditioning of union employment on relinquishment of a membership right brought reproach upon the union [in violation of the IBT constitution]). But the Second Circuit ignored that, relying on this Court's decision in *Finnegan*, the Ninth Supreme Court indicated in *Bloom* and the Supreme Court of California held in *Screen Extras Guild* that, with narrow exceptions not applicable here, conduct that is protected from prosecution under the LMRDA is also protected from prosecution under state law because the LMRDA preempts state law in this regard. By the same token, because Petitioners' alleged conduct is protected from prosecution under the LMRDA, it is also protected from prosecution under the IBT constitution. The Second Circuit's contrary holding conflicts with *Finnegan*, *Bloom*, and *Screen Extras Guild*, and this Court should grant a writ of certiorari to resolve the conflict.

In *Bloom*, a union administrator filed a wrongful discharge claim under state law, alleging that he was discharged for refusing to illegally alter minutes of a union meeting. *See* 783 F.2d at 1358, 1362. The Ninth Circuit, citing *Finnegan*, observed that "[t]he federal interest in promoting union democracy and the right of union members . . . includes an interest in allowing union leaders to discharge incumbent administrators." *Id.* at 1361-62. The court indicated that "allowing a state cause of action for wrongful discharge" might "generally undermine this federal interest and rob the union leader of discretion needed to serve the wishes of the membership and thus the purposes of the Act." *Id.* at 1362 (citing *Tyra v. Kearney*, 153 Cal. App. 3d 921, 926-27, 200 Cal. Rptr. 716, 719-20 (1984), for its "holding that a state claim for wrongful discharge was preempted by the LMRDA and the Supreme Court's decision in *Finnegan*"). The court, however, found that it did not need to decide the issue, because the petitioner in *Bloom* "allege[d] that he was fired, not for political reasons, . . . but rather because he refused to illegally alter the minutes of a union meeting" and "the federal interest is much lessened under these circumstances." *Id.*

In *Screen Extras Guild*, the Supreme Court of California, sitting in bank, decided the issue left open—albeit with a strong indication as to the outcome—by the Ninth Circuit in *Bloom*. The California Supreme Court observed:

> *Congress intends that elected union officials shall be free to discharge management or policymaking personnel.* Thus, allowing [wrongful discharge] claims to proceed in the California courts would "restrict the exercise of the *right to terminate* which *Finnegan* found [to be] 'an integral part of ensuring a union

> administration's responsiveness to the mandate of the union election.'"

800 P.2d at 880 (citing *Tyra*, 153 Cal. App. 3d at 927, 200 Cal. Rptr. at 719-20 (citing *Finnegan*, 456 U.S. at 441)) (emphasis supplied). The California Supreme Court added:

> To allow a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent. This would frustrate full realization of the goal of union democracy embodied by the LMRDA, in contravention of the supremacy clause.

Id. at 881. The California Supreme Court concluded: "Consequently, *the LMRDA and the supremacy clause preempt wrongful discharge claims brought against labor unions or their officials by former policymaking or confidential employees*." *Id.* (emphasis supplied). Such claims are preempted regardless of whether they "relate to the purposes of the LMRDA" or "are routine disputes between an employer and employee." *Id.* at 880.

Bloom and *Screen Extras Guild* stand for the rule that conduct that is protected from prosecution under the LMRDA is also protected from prosecution under state law, except in cases—such as actions for wrongful discharge motivated not by political reasons, but by the dischargee's refusal to engage in an illegal act—in which the federal interest in promoting union democracy and in the preemptive force of the LMRDA is lessened. *See Bloom*, 783 F.2d at 1362; *Screen Extras Guild*, 800 P.2d at 881-82.

As discussed in the previous section, Petitioners' alleged conduct is protected from prosecution under the LMRDA. Moreover, there is no question that the alleged conduct was motivated by political reasons—preventing disloyalty of appointive union administrators to elected union officials—

and the federal interest in promoting union democracy and in the preemptive force of the LMRDA is at its highest under these circumstances. Accordingly, under *Bloom* and *Screen Extras Guild*, Petitioners' alleged conduct was also protected from prosecution under state law.

By the same token, Petitioners' alleged conduct was furthermore protected from prosecution under the IBT constitution for bringing "reproach" upon the IBT.[2] Extending the preemptive reach of the LMRDA in this fashion is not an overly mechanical application of *Bloom* and *Screen Extras Guild*, but instead follows the logic and spirit of these cases by furthering the purposes of the Act. If permitting a cause of action under *general* state law for politically motivated wrongful discharge might undermine the federal interest in promoting union democracy and allowing elected union leaders to discharge appointive union administrators, see *Bloom*, 783 F.2d at 1361-62, then allowing a charge under a *specific* union constitution for conditioning employment on giving up certain political rights might also undermine these federal interests at least to an equal, if not larger, extent. And if "allow[ing] a state claim for wrongful discharge to proceed from the termination of a union business agent by elected union officials would interfere with the ability of such officials to implement the will of the union members they represent" and would thus "frustrate full realization of the goal of union democracy embodied by the LMRDA," *Screen Extras Guild*, 800 P.2d at 881, then the same is also true—perhaps even more so—of

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[2] Additionally, even if the prohibition against bringing "reproach" upon the IBT is not unconstitutionally vague on its face, it certainly is unconstitutionally vague *as applied to Petitioners*. One can hardly say that "it should have been clear" to Petitioners that the exercise of the rights of an elected official under the LMRDA, would, like "associating with known members of organized crime," bring reproach upon the IBT. *United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1298 (2d Cir. 1991).

allowing a "bringing-reproach-upon-the-union" charge under a union constitution to proceed from conditional employment of union business agents. A union constitution can no more abrogate an elected union official's LMRDA "right to terminate" appointive union administrators, *id.* at 880 (quoting *Tyra*, 153 Cal. App. 3d at 927, 200 Cal Rptr. at 719), than it could abrogate, *e.g.*, a union members LMRDA "right to meet and assemble freely with other members," 29 U.S.C. § 411(a)(2); App. D, p. 51a. Both attempts are preempted by the LMRDA. The Court of Appeals' holding affirming Petitioners' convictions on such a charge conflicts with what the Ninth Circuit indicated in *Bloom* and what the Supreme Court of California held in *Screen Extras Guild*, and this Court should grant a writ of *certiorari* to resolve the conflict.

II. THE COURT OF APPEALS' CREDIBILITY REVIEW RULING IN THIS CASE CONFLICTS WITH THAT OF THE SIXTH CIRCUIT IN *CONGLETON*.

In *Congleton*, the Sixth Circuit held that a conclusory opinion that fails to provide a rationale for crediting or discrediting testimony does not warrant affirmance. In the present case, the IRB credited certain testimony that was disfavorable to Petitioners, and discredited other testimony that was favorable to Petitioners, without providing a non-conclusory rationale for doing so. Under *Congleton*, the IRB's decision should, therefore, not have been affirmed. The Second Circuit, however, refused to review the IRB's credibility determination and affirmed the IRB's decision. The Second Circuit's credibility review ruling conflicts with that of the Sixth Circuit in *Congleton*, and this Court should grant a writ of certiorari to resolve the conflict. The need to adhere to the *Congleton* standard is highlighted in the present case, where some of the credited testimony was that of witnesses who had admittedly perjured themselves in the process.

A. Under *Congleton*, a Conclusory Opinion that Fails to Provide a Rationale for Crediting or Discrediting Testimony Does Not Warrant Affirmance.

In reviewing a decision of the IRB, courts apply the same standard that they apply when reviewing agency actions under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq. *See United States v. Int'l Bhd. of Teamsters*, 170 F.3d 136, 142 (2d Cir. 1999). Specifically, courts review the IRB's findings of fact for "'substantial evidence' on the whole record." *Id.* at 143. "Although narrow, [such] review . . . must nonetheless be careful, thorough and probing." *Id.* (quoting *Ward v. Brown*, 22 F.3d 516, 521 (2d Cir. 1994)).

In *Congleton*, the Sixth Circuit held that under the APA, it is "critical to the appellate review process" that the finder of fact "clearly set forth the rationale for his findings of fact." 743 F.2d at 429. The Sixth Circuit further held that a workers' compensation award had to be reversed because the finder of fact "merely credited the testimony" of several witnesses but "failed to provide his rationale for crediting this evidence," and that such *"[a] . . . conclusory opinion . . . does not warrant affirmance."* *Id.* at 429-30 (emphasis supplied); *see also Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414, 423 (6th Cir. 2000) (in reviewing an agency decision under the "substantial evidence" standard, reviewing courts "look to whether the agency explained any credibility judgment it made and whether it gave reasons for crediting one piece of evidence over another").

In the present case, the Second Circuit flat out refused to review the credibility determinations of the IRB. Instead, it merely stated that "the members of the IRB are 'best equipped to evaluate the demeanor, credibility, and ultimately the culpability of those who appear before them'" and, further, that "[i]n accordance with the great deference owed to the IRB's determinations, law in this circuit establishes that

a court 'will not substitute its assessment of a witness's credibility for that of the IRB.'" App. A, p. 7a (quoting *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 380 (2d Cir. 2001)).

As shown in the next section, the IRB in this case credited certain testimony and discredited other testimony without providing a non-conclusory rationale for doing so. Under *Congleton*, such an opinion "does not warrant affirmance," 743 F.2d at 430, and the Second Circuit decision nevertheless to affirm the IRB's conflicts with *Congleton*.

B. The IRB Credited Certain Testimony, Including that of Admitted Perjurers, and Discredited Other Testimony, Including that of Petitioners, Without Providing a Non-Conclusory Rationale for Doing so, and the IRB's Decision Should Therefore Have Been Reversed.

The evidence before the IRB at its April 2000 hearing consisted of (1) documentary evidence, chiefly "TITAN" records reflecting IBT members' dues status at the time of a October 22, 1998 IRB report; (2) transcripts of sworn 1996 and 1998 "testimony"[3] of twelve witnesses introduced at the hearing by the IRB Chief Investigator; (3) live testimony of

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[3] We place the term "testimony" in quotation marks because several of these transcripts on which the IRB relied, in lieu of live testimony, were not taken at depositions and did not entail testimony in the usual sense of the term. Instead, these transcripts were merely transcripts of IRB interviews at which neither Petitioner was present or represented, and over which no judicial or quasi-judicial officer presided. The IRB overruled the objections by Petitioners against this hearsay evidence, *see* App. C, p. 30a, and the Second Circuit affirmed this ruling, *see* App. A, p. 6a n.3. Given that much of the evidence relied upon by the IRB was inherently problematic, as explained in this note, the deficiencies in the credibility determinations of the IRB discussed in this section take on a special importance.

five witnesses called by the IRB Chief Investigator, four of which had already given testimony in 1996 and/or 1998; and (4) live testimony of eight witnesses called by Petitioners, including themselves. *See* App. C, pp. 18a-19a. As discussed below, the IRB found the testimony introduced by the IRB Chief Investigator credible and found the testimony introduced by Petitioners not credible, without providing in either case a non-conclusory rationale for doing so. This deficiency in the IRB's credibility determinations is particularly glaring in light of the fact that four of the witnesses whose testimony was introduced by the IRB Chief Investigator and relied upon as credible by the IRB had changed their stories between testifying in 1996 and testifying in 1998 and had thus admittedly perjured themselves on one or the other of these two occasions.

James Boardman ("Boardman") was Petitioner Mireles' chief accuser and the only witness who claimed that Mireles himself had created the alleged dues payments "scheme." In 1996, he testified that "in early 1990, he had been directed by Mireles to implement the dues policy (which included having the Business Agents go on self pay of dues instead of [payroll] check-off and then miss a dues payment so that they would be ineligible to vote or run for office)." *Id.* at pp. 20a-21a. In 1998, Boardman repeated this testimony. *See id.* at p. 23a. At the 2000 hearing, as per admission by the IRB, "Respondents' counsel . . . cross-examined Boardman and was effective in showing Boardman's animosity toward Mireles." *Id.* at p. 40a (emphasis added). Yet, without providing any rationale, non-conclusory or otherwise, the IRB stated: "We . . . accepted as credible Boardman's 1996 and 1998 testimony." *Id.* at p. 41a. Thus, with respect to this all-important witness, and despite its admission that he bore animosity toward Petitioner Mireles, the IRB did not even begin to satisfy the *Congleton* requirement of providing a non-conclusory rationale for its credibility determinations.

The same is true with respect to the IRB's credibility determinations regarding four witnesses against Petitioners who admittedly perjured themselves in either their 1996 or their 1998 testimony, i.e., Frank Sevilla ("Sevilla"), Gloria Smith ("Smith"), Billie Barnes ("Barnes"), and Rosie Frias ("Frias"). One of these witnesses, Sevilla, testified in 1996 that although he had missed dues payments, he had not been encouraged to do so and there had been no particular reason for having done so. *See id.* at p. 23a. The other three witnesses testified in 1996 but not on the alleged dues payments "scheme." *See id.* at p. 22a.

In 1998, "[l]ed by Sevilla," the four witnesses approached the IRB Chief Investigator to "correct," i.e. *change*, their earlier sworn testimony. *Id.* at p. 24a. Sevilla "admitted he had lied in 1996 when he said he had not been encouraged to miss dues payments (he said it was required . . .)."[4] *Id.* at p. 27a. Smith asserted that she had lied in 1996 not only about other matters not at issue here, see id. at p. 25a, but also—to the astonishment of the IRB, which found this at least "curious[]"—about the dues payments "scheme," despite the fact that she had not testified about this "scheme" at that time, *see id.* at p. 35a. Smith now testified that she had heard Boardman tell business agents "that they had to miss their dues, . . . and would be terminated if they did not." *Id.* at pp. 25a-26a. Barnes and Frias likewise admitted that they had lied in 1996 about other matters not at issue here and testified that they had known about the dues payments "scheme." *See id* at 26a.

The IRB had no illusions about what motivated this change of heart and sworn testimony by these four witnesses:

> It appears it was less their conscience that moved them all in this direction than the fact that they were unhappy

[4] It is of course at least equally likely that Sevilla and the other three witnesses who changed their testimony lied in 1998, when they accused Mireles, rather than in 1996, when they exonerated him.

> with Mireles' management of the Local's affairs, and Sevilla admitted that he wanted to regain eligibility since he was thinking of joining with others to defeat Mireles in the upcoming elections.

Id. at p. 24a. Yet despite this motivation, and despite the fact that all four witnesses had admittedly perjured themselves, the IRB went on to credit their changed testimony without providing a non-conclusory rationale.

As to Sevilla, the ringleader of this group who had admittedly committed *perjury on the matters at issue here*, the IRB "found impressive the cross examination . . . by Respondent's counsel in demonstrating Sevilla's *animus towards Mireles* and his *questionable motives* in changing his 1996 sworn testimony." *Id.* at 38a (emphasis supplied). This was the IRB's *only* comment regarding Sevilla's credibility, save a statement that "the fact remains that there was overwhelming evidence from other witnesses and from the TITAN records that corroborated Sevilla's testimony about the dues scheme." *Id.*

Similarly, as to Smith, the IRB stated:

> [N]othwithstanding her *lying* in 1996, and the reasons she conceded she had for *having a prejudice against Mireles*, . . . we ultimately concluded she was a truthful witness before us and in her 1998 testimony, based upon our own impression of her as a witness as she testified and the several elements in the evidence that were consistent only with her telling the truth in 1998 and before us.

Id. at p. 36a (emphasis supplied). The IRB offered no explanation of the basis for its "impression" that Smith was a truthful witness.

And again as to Barnes: "Notwithstanding Barnes' having admittedly *lied* in 1996, . . . we credit her testimony given to

the Chief Investigator in 1998 in that it draws support from other testimony and the TITAN records." *Id.* at p. 31a (emphasis supplied). Finally, and perhaps most egregiously, the IRB made no credibility determination at all regarding Frias, although it repeatedly referred to his testimony as apparently reliable evidence in the remainder of its opinion. *See id.* at pp. 43a, 47a, 48a, 49a.

None of the IRB's discussion of the testimony by these four admitted perjurers constitutes a non-conclusory rationale for crediting this testimony. At most, the IRB asserted that this testimony was credible because it was supported by the TITAN records and other testimony, which for each of the perjurers was primarily that of the other perjurers.[5] As for the TITAN records, they show no more than that in 1990, the Local switched from a check-off system to a self-pay system, *as required by California Labor law*,[6] and that afterwards, the business agents were often tardy in their dues payments, *many times more than needed to make them ineligible to run in union elections*. Such innocent evidence cannot lend credibility to the testimony of the four admitted perjurers that Petitioner Mireles created a system conditioning union employment on late payment of union dues to make union employees ineligible to run in union elections. Nor does it lend credibility to the testimony of each perjurer that it was "corroborated" by the testimony of three other perjurers. The IRB engaged in classic "bootstrapping," apparently believing

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[5] Petitioners reiterate that in Frias' case, as in Boardman's case, the IRB did not even do that and did not provide *any* rationale, non-conclusory or otherwise, for crediting her testimony.

[6] Sections 221-24 of the California Labor Code make it unlawful for an employer "to withhold or divert any portion of an employee's wages" unless "a deduction is expressly authorized in writing by the employee." CAL. LAB. CODE § 224 (West 1989). The Local had no written authorization from the tardy business agents to deduct union dues from their wages.

that if enough witnesses admittedly perjure themselves in a concerted effort, their testimony becomes credible.

The IRB dealt with the credibility (or lack thereof) of the testimony by Grant Ruff ("Ruff") in a similar fashion, deeming it credible—despite the fact, acknowledged by the IRB, that Ruff was fired by Petitioner Mireles for using a Local credit card for personal expenses and thus had reason to wish Mireles ill—because it was supported by the testimony of other witnesses and the TITAN records. *See id.* at pp. 33a-34a. Finally, as was the case with Boardman and Frias, the IRB did not provide *any* rationale, non-conclusory or otherwise, for crediting the testimony of Michael McDonald ("McDonald"). Instead, the IRB simply stated: "We found McDonald credible and accepted his testimony as true." *Id.* at p. 38a. Under *Congleton*, that is not nearly enough.

The IRB discredited the testimony by witnesses called by Petitioners in a similar, at best conclusory, fashion. With respect to specific testimony by Petitioner Mireles himself, the IRB simply stated: "We did not find Mireles' explanation credible." App. C, p. 33a n.9. More generally, the IRB said about Mireles' testimony:

> We did not find Mireles to be a credible witness. Not only was his testimony inconsistent with the testimony of numerous witnesses—in each case he had denied what another witness said—but we found him to be evasive and non-responsive to questions critical to the case. Finally, we found it totally unacceptable that he seemingly knew so little about what was going on in his union.

Id. at p. 42a. Here, the IRB once more engaged in "bootstrapping": Because Mireles consistently denied the charges against him—i.e., that he created a dues payments "scheme" by which his business agents made themselves ineligible to run in union elections as a condition on their

employment—and thus contradicted his accusers, he lacked credibility. Apparently, in the eyes of the IRB, the only way in which Mireles could have become a credible witness would have been for him to admit the charges.

The IRB's approach to the testimony by Petitioner Roa and James Fitzgerald ("Fitzgerald") is the mirror image to its approach to the testimony by Sevilla, Smith, and Barnes. The IRB concluded that "Roa's protest that he was not involved in the scheme to force Business Agents to make late payments is not credible." *Id.* at p. 45a. As a reason for this conclusion, the IRB stated: "From the documentary evidence of the TITAN records and his prior sworn examination testimony to the contrary, . . . Roa's denial of the existence of the scheme is difficult to accept." *Id.* And similarly regarding Fitzgerald: "[W]e could not credit Fitzgerald's testimony" because "[i]t was unsupported by anyone" and "at odds with the credible evidence." *Id.* at p. 40a. But just as the innocent TITAN records do not add to the credibility of the testimony by Sevilla, Smith, and Barnes, they also do not subtract from the credibility of the testimony by Roa and Fitzgerald. In addition, the IRB left wholly unexplained why the "prior sworn examination testimony to the contrary" by Sevilla, Smith, and Barnes did not make them non-credible witnesses, but the "prior sworn examination testimony to the contrary" by Roa made him a non-credible witness.

The IRB rejected other testimony by Petitioner Roa even more summarily: "Again, we found Roa not a credible witness." *Id.* at p. 45a. This was also the IRB's attitude towards testimony by Harry Ashley ("Ashley") and Marvin Anderson ("Anderson"): "We found it difficult to credit Ashley's testimony . . . ." *Id.* at p. 39a. "We gave [Anderson's] testimony little weight . . . ." *Id.* at p. 40a. In each of these cases, the IRB did not provide any rationale, non-conclusory or otherwise, for discrediting the testimony by these witnesses.

In determining that the witnesses in this case were either credible (if they testified *against* Petitioners) or not credible (if they testified *for* Petitioners), the IRB provided at best conclusory rationales. More egregiously, in determining that Boardman, Frias, and McDonald were credible witnesses and that Ashley and Anderson were not credible witnesses, the IRB provided no rationale at all, not even a conclusory one. As discussed above, this also holds true of the IRB's credibility determination as to part of Mireles' and Roa's respective testimony. The IRB thus violated the rule announced by the Sixth Circuit in *Congleton* that a finder of fact must "provide his [or her] rationale for crediting . . . evidence" and that "[a] . . . conclusory opinion . . . does not warrant affirmance." 743 F.2d at 429-30. The Second Circuit nevertheless affirmed the IRB's opinion and thereby created a circuit conflict. This Court should grant a writ of certiorari to resolve this conflict.

CONCLUSION

For the reasons stated, the Court should grant this petition for a writ of certiorari and grant plenary review.

Respectfully submitted,

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January 21, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 01-6054

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

and

CHARLES M. CARBERRY,
Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, *et al.*,
Defendants,

and

ED J. MIRELES AND PAUL ROA,
Appellants.

Argued: Oct. 15, 2002
Decided: Jan. 02, 2003

Before JACOBS, SACK, KATZMANN, Circuit Judges.

PER CURIAM.

Edward J. Mireles and Paul J. Roa appeal from a final order of the United States District Court for the Southern District of New York (Preska, J.), which granted an application of the Independent Review Board ("IRB") for entry of an order upholding charges and sanctions imposed against Mireles and Roa, both members and former officers

of the International Brotherhood of Teamsters ("IBT"). For the following reasons, we affirm.[1]

BACKGROUND

Facts relevant to this appeal have been summarized previously in numerous opinions of this Court, familiarity with which is assumed. *See, e.g., United States v. IBT* ("IRB Rules"), 998 F.2d 1101, 1105-06 (2d Cir.1993); *United States v. IBT* ("1991 Election Rules Order"), 931 F.2d 177, 180-82 (2d Cir.1991); *United States v. IBT* ("Friedman & Hughes"), 905 F.2d 610, 612-15 (2d Cir.1990).

In the proceedings at issue in this appeal, the IRB found that Mireles, the Secretary-Treasurer and principal officer of IBT Local 952 from 1989 until 1999, instituted a policy requiring IBT members who served as business agents of the local union to make dues payments on an untimely basis. Since a member who pays dues late is ineligible to run for a local office position, Mireles thereby disabled his business agents from challenging him in a union election. The district court's order upheld the IRB's findings that Roa enforced Mireles' scheme, and that Mireles lied under oath about his role in it and encouraged others to do the same. The court affirmed the IRB's ruling barring Mireles and Roa from holding any position as IBT officers for seven and four years, and suspending them from IBT membership for four and two years, respectively.

On appeal, appellants Mireles and Roa argue that (1) the IRB lacked authority to sanction their alleged conduct, and

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[1] Our decision on this appeal originally appeared in an unpublished summary order, issued on October 23, 2002. The government subsequently moved to have the decision published. Because we are persuaded that this decision may have some precedential value, we grant the motion and publish our disposition.

(2) the IRB's finding that Mireles and Roa brought reproach upon the IBT is not supported by substantial evidence.

I.

We conclude that the IRB had authority to sanction the conduct at issue. This proceeding arises under the Consent Decree that resolved claims brought by the United States against the IBT and other defendants under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964. *See* 1991 Election Rules Order, 931 F.2d at 180-81. The Consent Decree implemented a number of measures "premised on the notion that [standards imposed by federal labor law] were not sufficient to rid the IBT of corruption and the influence of organized crime, or to bring democracy to the IBT." *United States v. IBT* ("Carey Disqualification"), 988 F.Supp. 759, 768 (S.D.N.Y.1997), *aff'd,* 156 F.3d 354 (2d Cir.1998). The purpose of the reforms was to achieve the goal "that the IBT . . . be maintained democratically, with integrity and for the sole benefit of its members without unlawful outside influence." *United States v. IBT* ("IRB Rules"), 803 F.Supp. 761, 767 (S.D.N.Y.1992), *aff'd as modified,* 998 F.2d 1101 (2d Cir.1993).

The Consent Decree provided for the establishment of the IRB, "a permanent institution vested with power to investigate and eradicate corruption, and to monitor the IBT's attempts to eradicate corruption." *Id.* at 780. Pursuant to the Consent Decree, the IRB's authority is co-extensive with that of the IBT General President and General Executive Board ("GEB") under the IBT Constitution. Since the IBT Constitution authorizes the IBT General President and GEB "to interpret and apply" the IBT Constitution and "to decide all questions of law thereunder," the IRB's authority "necessarily includes the final authority to decide what constitutes an offense subject to discipline under the IBT

Constitution." *Friedman & Hughes,* 905 F.2d at 619 (citing IBT Const. Art. VI, Sec. 2(a), Art. IX, Sec. 1). Therefore, the scope of the IRB's power under the Consent Decree is not limited to violations of federal labor or criminal law. The Consent Decree recognizes that "conduct . . . that brings reproach upon [the IBT]," in violation of Article II, Section 2(a) and Article XIX, Sections 7(b)(1) and (2) of the IBT Constitution, is "within the [IRB's] investigatory and decisional authority." *See IRB Rules,* 803 F.Supp. at 802 (stating and approving rules governing operation of IRB), *aff'd in relevant part,* 998 F.2d 1102 (2d Cir .1993).

The IRB therefore had authority to investigate and bring disciplinary charges when it learned of the scheme involving dues default, and suspected that the scheme brought reproach upon the IBT.[2] Mireles and Roa contend that their conduct was not unsavory because it was not inconsistent with the Labor- Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), and therefore did not bring reproach upon the union, citing *Finnegan v. Leu,* 456 U.S. 431, 102 S.Ct. 1867, 72 L.Ed.2d 239 (1982), and *Bloom v. Local 952,* 783 F.2d 1356 (9th Cir.1986). In *Finnegan,* the

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[2] When the IRB, pursuant to its investigatory powers, first learned about Mireles' and Roa's alleged improper conduct, it did not immediately bring disciplinary charges but conducted an evidentiary hearing and issued an investigative report recommending, *inter alia,* that the IBT bring charges against Mireles and Roa. Two IBT panels heard evidence regarding the charges; the first rendered no decision, and the second found that the charges had been sustained against Mireles but not against Roa. The IBT's General Executive Board ("GEB") adopted the panel's findings and recommendations with respect to Mireles, and the IBT's president adopted the findings and recommendations with regard to Roa. On appeal, the IRB declared the IBT's decisions regarding Mireles and Roa to be inadequate, and, upon finding that the actions of the GEB and its president were inadequate, scheduled its own hearing on the charges. The hearing took place on April 17-18, 2000, and the IRB's decision, dated October 17, 2000, stemmed from the hearing.

Supreme Court considered "whether the discharge of a union's appointed business agents by the union president, following his election over the candidate supported by the business agents, violated the [LMRDA]," 456 U.S. at 432, and ruled that because the LMRDA protects the rights of union members as members and not as union employees, the termination of business agents because of their support for a rival candidate did not violate the LMRDA so long as the business agents retained their membership rights. *Finnegan,* 456 U.S. at 438- 41. In *Bloom,* the Ninth Circuit (relying on *Finnegan*) held that a business agent of Local 952 who was discharged because he supported a rival candidate in the local union's election failed to state a claim for relief under the LMRDA. 783 F.2d at 1359 & n. 3.

Finnegan and *Bloom* are distinguishable. The issue here is not whether the business agents have an actionable claim for impairment of their membership right to stand for election, but whether the conditioning of union employment on relinquishment of a membership right brought reproach upon the union. The *Finnegan* and *Bloom* courts held only that the business agents there had no cause of action under the LMRDA, because although they lost their positions as business agents, they retained their rights as members. Here, the business agents were deprived of their rights as members to run for election to union office. *See Carey Disqualification,* 156 F.3d at 361 (holding that act of making a person ineligible to seek union office "affects him as a member" under federal labor law). We think that the IRB's findings that Mireles and Roa secretly affected the rights of members are sufficient to support its exercise of jurisdiction, which is not limited to violations of federal labor law but is instead, under the Consent Decree, coextensive with that of the IBT General President and General Secretary-Treasurer.

II

We conclude that substantial evidence supports the IRB's findings that Mireles and Roa brought reproach upon the IBT. Substantial evidence is something more than "a mere scintilla" but something less than "the weight of the evidence," *see United States v. IBT* ("Simpson"), 120 F.3d 341, 346 (2d Cir.1997) (internal citations omitted), and the "test is deferential," *United States v. IBT* ("Giacumbo"), 170 F.3d 136, 143 (2d Cir.1999). "Substantial evidence includes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Simpson,* 120 F.3d at 346 (internal citation and quotation marks omitted). Inferences that the IRB draws from facts are "discretionary and can only be disturbed if they are arbitrary and capricious." *Giacumbo,* 170 F.3d at 143 (internal quotation marks omitted).

At a hearing conducted by the IRB on April 17 and 18, 2000, the Chief Investigator called five witnesses, introduced into evidence transcripts of sworn testimony of twelve current and former members of Local 952, and submitted printouts from the IBT's computer system.[3] Mireles and Roa called six witnesses and testified in their own defense. Ten witnesses confirmed that Mireles was involved in a scheme that required certain business agents who were not enrolled in an automated dues "check-off" system to miss a monthly dues payment to ensure ineligibility. Computer records showed

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[3] Mireles and Roa challenge the IRB's reliance on hearsay testimony of witnesses who were not subject to cross-examination. The IRB may rely on hearsay so long as it is "reliable." *See United States v. IBT ("Boggia"),* 167 F.3d 113, 118 (2d Cir.1999); *United States v. IBT ("DiGirlamo"),* 19 F.3d 816, 823-24 (2d Cir.1994). Hearsay is "reliable" for the purposes of an IRB hearing if it is corroborated by other hearsay or non-hearsay evidence, includes specific detail, or is made under oath. *See DiGirlamo,* 19 F.3d at 823; *United States v. IBT ("Cimino"),* 964 F.2d 1308, 1312-13 (2d Cir.1992). The sworn statements at issue are sufficiently reliable. They corroborated each other and were corroborated by the TITAN records.

that before 1990 all officers, business agents, and employees of the local paid their dues by "check-off," that within three months after Mireles assumed office, business agents paid dues by "self-pay" method, and that (with one exception) "no business agent on the self-pay system was eligible to run in the 1992, 1995, and 1998 Local 952 Local officer elections." In short, the scheme at issue secretly narrowed the field of possible officers, partially insulated an officeholder from challenge, and thereby impaired the system of open competitive election to union office. We think this is enough to bring reproach upon the union.

Mireles and Roa argue the credibility and proper weight of certain testimony; however, the members of the IRB are "best equipped to evaluate the demeanor, credibility, and ultimately the culpability of those who appear before them." *United States v. IBT ("Carey & Hamilton")*, 247 F.3d 370, 380 (2d Cir.2001) (internal quotation marks omitted). "In accordance with the great deference owed to the IRB's determinations, law in this circuit establishes that a court 'will not substitute its assessment of a witness's credibility for that of the IRB.'" *Id.* (quoting *United States v. IBT ("Simpson")*, 931 F.Supp. 1074, 1096 (S.D.N.Y.1996), *aff'd*, 120 F.3d 341 (2d Cir.1997)).

CONCLUSION

For the foregoing reasons, the order of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. NEW YORK

[Filed Feb. 21, 2001]

No. 88 CIV 4486 LAP

UNITED STATES OF AMERICA
Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Defendants.

MEMORANDUM and ORDER

PRESKA, J.

WHEREAS on October 22, 1998, the Independent Review Board ("IRB") issued an Investigative Report recommending charges against: (a) International Brotherhood of Teamsters ("IBT") Local 952 Secretary-Treasurer Edward J. Mireles ("Mireles") in Los Angeles, California, for requiring IBT business agents to fail to pay membership dues in a timely manner, thus disqualifying these IBT members from running for local union office against Mireles, and for failure to cooperate with the IRB by testifying falsely at IRB sworn examinations and encouraging local officers and employees to make false statements to the IRB, thereby bringing reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Sections 7(b)(1) and (2) of the IBT Constitution; and (b) Local 952 member Paul J. Roa ("Roa") for aiding and abetting the practice of requiring IBT business agents to fail to pay membership dues in a timely manner, thereby bringing reproach upon the IBT in violation of

Article II, Section 2(a) and Article XIX, Sections 7(b)(1) and (2) of the IBT Constitution; and

WHEREAS on November 5, 1998, the IRB directed the report to IBT Acting General President Tom Sever ("Sever") for appropriate action by the IBT General Executive Board ("GEB"); and

WHEREAS an IBT hearing panel appointed by Sever conducted hearings in January and March 1999 and did not render a decision; and

WHEREAS an IBT hearing panel appointed by IBT General President James P. Hoffa ("Hoffa") held hearings from May 11 through May 13, 1999 at which charges were presented against Mireles and Roa; and

WHEREAS the second hearing panel issued a decision: (a) finding that Mireles brought reproach upon the IBT by requiring Local 952 business agents to miss dues payments in order to prevent them from obtaining eligibility to run for office and by testifying falsely at IRB sworn examinations, and therefore recommending that Mireles be removed from office and suspended from IBT membership for three years; (b) finding that the IRB failed to prove by a preponderance of reliable evidence that Mireles encouraged other Local Union 952 officers and employees to lie to the IRB, and therefore recommending that these charges be dismissed; and (c) finding that the IRB failed to prove the charges against Roa, and therefore recommending that the charges against Roa be dismissed; and

WHEREAS on July 30, 1999, by letter, Hoffa informed Mireles and Roa that the GEB had adopted the findings and recommendations of the hearing panel with regard to the charges against Mireles and that Hoffa had adopted the findings and recommendations of the hearing panel with respect to the charges against Roa; and

WHEREAS on August 16, 1999, Mireles filed a motion to stay the GEB decision and to appeal the decision to the IRB; and

WHEREAS by letter of September 7, 1999, Florence Hoffman, Esq. ("Hoffman") informed the IRB that Mireles had retained her as counsel and requested an opportunity to appear before the IRB on his behalf; and

WHEREAS on September 8, 1999, at the direction of the IRB, John J. Cronin, Jr. ("Cronin"), the IRB administrator, via UPS overnight mail, advised Hoffman to submit any challenge to the GEB decision for the IRB's consideration by September 27, 1999; and

WHEREAS by letter of November 1, 1999, Cronin advised the GEB that the IRB found inadequate (a) the GEB's decision with respect to the charges that Mireles had encouraged others to lie to the IRB and the sanction it had imposed on Mireles, and (b) Hoffa's decision with respect to the charges against Roa; and

WHEREAS by facsimile and letter dated November 8, 1999, the GEB and Hoffa, respectively, expressed to the IRB disagreement with the IRB's findings; and

WHEREAS by letters dated November 19, 1999, Cronin informed the GEB and Hoffa of the IRB's finding that the GEB and Hoffa had failed to remedy their respective decisions and that therefore a hearing on the charges against Mireles and Roa was scheduled for February 14, 2000 at the law offices of LeBoeuf, Lamb, Greene, & MacRae, 725 South Figueroa Street, Los Angeles, California; and

WHEREAS on November 30, 1999, by UPS overnight mail, Cronin served upon Mireles and Roa notice of the hearing scheduled for February 14 and 15, 2000, at 9:00 a.m., at the law offices of LeBoeuf, Lamb, Greene, & MacRae; and

WHEREAS on January 4, 2000, by UPS overnight mail, Cronin advised Mireles and Roa that the hearing had been rescheduled for 9:00 on February 17 and 18, 2000, at the same location; and

WHEREAS by facsimile and letter dated February 8, 2000, Glenn Rothner, Esq. ("Rothner) informed the IRB that Mireles had recently retained him as counsel and therefore requested a continuance; and

WHEREAS by facsimile and letter dated February 9, 2000, Cronin informed Rothner, Mireles and Roa that the IRB had granted the request for a continuance; and

WHEREAS by letter dated February 29, 2000, Cronin informed Rothner, Mireles and Roa that the hearing would take place on April 17 and April 18, 2000 at the Marriott Los Angeles Airport Hotel, 5855 West Century Boulevard, Los Angeles, California, starting each day at 8:30 a.m.; and

WHEREAS on April 17 and 18, 2000 the noticed hearing went forward before the IRB; and

WHEREAS at the hearing, the IRB reviewed evidence including the testimony of several current and former Local 952 officers, business agents and clerical employees, documentary evidence, and the testimony of Mireles and Roa; and

WHEREAS by Application LXXXVII, dated October 17, 2000 ("IRB Application LXXXVII"), upon finding the evidence established that Mireles and Roa brought reproach upon the IBT as charged, the IRB issued an Opinion and Decision ("IRB Opinion and Decision") (a) barring Mireles from holding a position as an officer with the IBT or any IBT-affiliated entity for seven years and suspending Mireles from IBT membership for four years, and (b) barring Roa from holding a position as an officer with the IBT or any

IBT-related entity for four years and suspending Roa from IBT membership for two years; and

WHEREAS on October 24, 2000 and October 27, 2000, through counsel, Mireles and Roa requested a stay of the IRB Opinion and Decision pending further order of this Court; and

WHEREAS by Order dated November 2, 2000, this Court offered Mireles and Roa the opportunity to submit written objections to IRB Application LXXXVII no later than ten business days from the date of the Order; and

WHEREAS by Order dated November 9, 2000, this Court denied Mireles and Roa's request for a stay; and

WHEREAS on November 15, 2000, through counsel, Mireles and Roa submitted objections to IRB Application LXXXVII; and

WHEREAS by Order dated November 20, 2000, this Court offered the Government an opportunity to respond to Mireles and Roa's objections no later than ten business days from the date of the Order; and

WHEREAS on December 5, 2000, the Government responded to the objections and asked this Court to grant IRB Application LXXXVII; and

WHEREAS this Court reviews determinations made by the IRB under an "extremely deferential standard of review," *United States v. IBT ("Simpson")*, 120 F.3d 341, 346 (2d Cir.1997); and

WHEREAS having reviewed the IRB Opinion and Decision and all accompanying exhibits, as well as the submissions to this Court by the parties, this Court finds that, contrary to the claims of Mireles and Roa, (a) the IRB properly exercised its disciplinary authority in this case, as the IRB's jurisdiction is not limited to violations of federal law, *see United States v. IBT ("Ligurotis")*, 814 F.Supp. 1165, 1182-83 (S.D.N.Y.1993), and (b) "substantial

evidence" supported the IRB's factual findings, and the IRB's determinations of credibility of witnesses and reliability of evidence were not "arbitrary and capricious," *United States v. IBT ("Giacumbo")*, 170 F.2d 136, 143 (2d Cir.1999); *United States v. IBT ("Senese & Talerico")*, 745 F.Supp. 908, 914 (S.D.N.Y.1990), *aff'd*, 941 F.2d 1292 (2d Cir.1991); and

WHEREAS having reviewed the sanctions imposed by the IRB, this Court finds that the sanctions are proportionate to the severity of the misconduct of which Mireles and Roa are guilty; and

WHEREAS accordingly, this Court finds that IRB Application LXXXVII should be granted;

IT IS HEREBY ORDERED THAT Application LXXXVII of the Independent Review Board regarding the charges and sanctions imposed against Edward J. Mireles and Paul Roa is GRANTED.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 4486 (DNE)

UNITED STATES OF AMERICA,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,
Defendant.

OPINION AND DECISION OF THE
INDEPENDENT REVIEW BOARD

IN RE: EDWARD J. MIRELES
PAUL J. ROA
IBT LOCAL 952

I. INTRODUCTION

On April 17 and 18, 2000, the Independent Review Board ("IRB") held a hearing on certain charges against International Brotherhood of Teamsters ("IBT") Local 952 Secretary-Treasurer Edward J. Mireles ("Mireles") and Local 952 member Paul J. Roa ("Roa") in Los Angeles, California. The charges and the hearing arise from the following fact: and circumstances.

On October 22, 1998 the IRB issued an Investigative Report with the accompanying Exhibits and forwarded the same to Mr. Randy Cammack, President of IRB Joint Council 92, recommending charges against Respondents Mireles and Roa. On November 5, 1998 the IRB redirected the report to

IBT Acting General President Tom Sever ("Sever") for appropriate action by the General .Executive Board ("GEB"), which had jurisdiction due to Mireles's position as an elected International Officer. That report was marked at the hearing before the IRE as IRB-Ex. 1.[1] The Respondents received a copy of that report.

The Charges against Mireles are as follows:

> Charge One: While Secretary-Treasurer and a member of Local 952 and the IBT, from 1990 to the present, you brought reproach upon the IBT in violation of Article II, Section 2(a) and Article XIX, Section 7(b) (1) and (2) of the IBT Constitution, to wit:
>
> While an officer and member of Local 952 and the IBT, you required Business Agents to fail to make a month's dues payment in a timely manner, thereby making them ineligible to run for office in a Local Union officer election under Article II, Section 4(a) (1) of the IBT Constitution and Article VII, Section 2 of the Local Union 952 Bylaws.
>
> Charge Two: While Secretary-Treasurer and a member of Local 952 and the IBT, you brought reproach upon the IBT in violation of Article II, Section 2 (a) and Article XIX, Section 7 (b) (1) and 14 (i) of the IBT Constitution, to wit:
>
> While an officer and member of local 952 and the IBT you failed to cooperate with the IRB at your sworn examination testimony of October 18, 1996 when you testified falsely concerning the Local's practice of

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[1] "IRB-Ex.__" refers to the exhibits of the IRE introduced at the IRE hearing on April 17.18, 2000; "E.__" refers to the exhibits accompanying the report; "CI-___" refers to the exhibits introduced at the IRE hearing; "R-___"refers to exhibits introduced by the Respondents at the IRE hearing; "Tr.___" refers to the transcript of the IRE hearing.

> requiring a business agent to miss a monthly dues payment and in encouraging the local officers and employees to lie to the IRB.[2]

The Charge against Roa is as follows:

> While a Business Agent and a member of Local 952 and the IBT, from 1994 to the present, you brought reproach on the IBT in violation of Article II, Section 2(a) and Article XIX, Sections 7(b) (1) and (2) of the IBT Constitution, to wit:
>
> While an officer and member of Local 952 and the IBT, you aided and abetted the practice at the Local which required Business Agents to fail to make a month's dues payment, in a timely manner, and thereby became ineligible to run for office in a Local Union officer election under Article II, Section 4(a) (1) of the IBT constitution and Article VII, Section 2 of the Local Union 952 Bylaws.

Two IBT hearing panels heard evidence in this proceeding. The first panel, appointed by then Acting IBT General President Sever, conducted hearings in January and March 1999. It did not render a decision. It was succeeded by a second an, appointed by IBT General President Hoffa ("Hoffa"), which held hearings from May it through May 13, 1999.

In its decision ("Decision") the second panel found as to the first charge, that, with Mireles' knowledge, involvement and consent, a policy existed at Local 952 from early 1990 which required Business Agents who were not also members of the Local's Executive Board to miss a dues payment during the appropriate candidate eligibility periods preceding the Local Union's election of officers in 1992, 1995 and 1998. On the other charge against Mireles, the panel found

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[2] This testimony was taken by the IRS's Chief Investigator's office.

that he had lied at his 1996 sworn IRS Chief Investigator's examination but that he had not encouraged other Local 952 members to lie to the Chief Investigator. The hearing panel thus recommended that charge be dismissed. The panel further recommended that Mireles be removed from office and be suspended from IBT membership for three years.

As to the charge against Roa, the panel found that charge had not been sustained and recommended that it be dismissed.

On July 30, 1999, Hoffa wrote Mireles and Roa that the GEE had adopted the findings and recommendations of the hearing panel with regard to the charges against Mireles, and that he, Hoffa, had adopted the findings and recommendations of the hearing panel with regard to the charge against Roa.

On August 16, 1999, Mireles filed a motion to stay the GEB decision and to appeal the GEB decision to the IRB, alleging that there was a conspiracy to remove him from office and that certain Local 952 members testified falsely at their sworn IRB examinations and before the IBT hearing panel, with the purpose of having Mireles removed from office.

By letter of September 7, 1999, Florence Hoffman, Esq. retained her as counsel on his appeal from the GEB decision, and she requested an opportunity to appear before the IRB on Mireles' behalf. By letter dated September 8, 1999, the IRB advised Hoffman to submit any challenge to the GEE decision for the IRB's consideration by September 27, 1999.

However, before any action resulted from Hoffman's letter, by letter of November 1, 1999, the IRB advised the GEB that it found inadequate the GEB's decision concerning Mireles both as to its finding on "the failure to cooperate with the IRB charge" and as to the three-year suspension sanction imposed. The IRB also advised Hoffa that it found his decision on Roa inadequate.

By letter dated November 8, 1999, the GEB stated that it had found that Mireles had failed to cooperate with the IRB in that he had testified untruthfully in the earlier proceeding but that it had not found that he had encouraged others to lie to the IRB's Chief Investigator. It deemed the originally imposed sanction appropriate. As to Roa, Hoffa adhered to his original decision and affirmed the dismissal of the charge against Roa.

On November 19, 1999, the IRE advised Hoffa that the GEB (with regard to Mireles) and Hoffa (with regard to Roa) had failed to ("Hoffman"), an attorney, informed the IRB that Mireles had remedy the defects in their decisions. The IRB scheduled the matter for a de novo hearing on February 14 and 15, 2000, and on November 30, 1999, notified Mireles and Roa that the hearing would be held in Los Angeles, California. Subsequently, the IRB notified Mireles and Roa, by letter of January 4, 2000, that the hearing in Los Angeles would be held on February 17 and 18, 2000.

In his letter of February 8, 2000, to the IRB, Glenn Rothner, Esq. ("Rothner") notified the IRE that he was representing the Respondents and asked that the hearing be postponed. The IRE, by letter of February 9, 2000, notified Rothner, Mireles and Roa that the hearing would be rescheduled and, by letter of February 29, 2000, notified Rothner, Mireles and Roa that the hearing would be held on April 17 and 18, 2000 at the Marriott Los Angeles Airport Hotel; and it did go forward on those dates.

II. IRB BEARING OF THE CHARGES

At the hearing before us, the IRB Chief Investigator's Special Counsel, Dennis Milton, Esq. ("Milton"), introduced the transcripts of the sworn 1996 and 1998 testimony of twelve current and former members of Local 952, taken by the Chief Investigator's representative on the dates indicated: James Boardman ("Boardman") (October 8, 1996 and

September 2, 1998) IRE-Ex. 1 (at E. 4 and 5); Billie Barnes ("Barnes") (October 11, 1996 and September 2, 1998) IRB-Ex. 1. (at E. 39 and 8); Rosie Frias ("Frias") (October 11, 1996 and August 31, 1998) IRE-Ex. 1 (at E. 38 and 15); Grant Ruff ("Ruff") (October 8, 1996 and September 28, 1998) IRB-Ex. 1 (at E. 6 and 7); Frank Sevilla ("Sevilla") (October 11, 1996 and August 31, 1998) IRE-Ex. 1 (at E. 37 and 13); Michael McDonald ("McDonald") (October 8, 1996) IRB-Ex. 1 (at E. 11); Gloria Smith ("Smith") (October 11, 1996 and August 31, 1998) IRB-Ex. 1 (at E. 40 and 12); Jerry Wiley ("Wiley") (September 2, 1998) IRB-Ex. 1 (at E. 9); James King ("King") (September 1, 1998) IRB-Ex. 1 (at E. 10); Sharon Sanzaro ("Sanzaro") (August 31, 1998) IRB-Ex. 1 (at E. 14); Mireles (October 11, 1996 and September 28, 1998) IRB-Ex. 1 (at E. 1 and 2); and Roa (September 28, 1998) IRE-Ex. 1 (at E. 3). The Chief Investigator also introduced at the hearing before us transcripts of the sworn IBT hearing testimony of Boardman (CI-1), Barnes (CI-2), King (CI-3), Frias (CI-4), Ruff (CI-5), Sevilla (CI6), McDonald (CI-7) and Smith (CI-8). However, we did not review these (except to the extent Respondents' counsel read the excerpts into the record in examining witnesses) and our decision is not based upon the testimony contained therein. The Chief Investigator also called as witnesses at the hearing before us, James Reilly, Ruff, McDonald, Sevilla and Smith, and introduced certain documentary evidence, including TITAN printouts reflecting IBT members' dues status at the time of the October 22, 1998 IRB report.

The Respondents at the hearing before us called as witnesses Hoffman, the previous attorney for Mireles; Harry Ashley ("Ashley"), Local 952's President and a Business Agent during the relevant time period; Local 952 members James Fitzgerald ("Fitzgerald") and Marvin Anderson ("Anderson"); Carmen Arce ("Arce"), Local 952's Office Manager; Michael Patton ("Patton"), a Business Agent of Local 952; and, finally, Mireles and Roa.

The IRS called Boardman as a witness.

A. The Evidence From the Chief Investigator's Investigation Leading to the Charges

Before addressing the testimony heard by us at the April 1718 hearing, it will be helpful to an understanding of this matter to examine in some detail the sworn testimony taken by the Chief Investigator's representatives in 1996 (Ms. Celia Zahner) ("Zahner") and 1998 (Milton) upon which the Chief Investigator relies in the proceeding before us.

1. The 1996 Testimony

On October 8, 1996, the Chief Investigator's counsel, Zahner, took sworn testimony of Ruff, Boardman and McDonald. Ruff, IRB-Ex. 1 (at E. 6), who was no longer a member of Local 952, testified about the so-called "dues policy," that forced staff members to miss a month's payment of dues during a two-year period immediately preceding a Local 952 election, thus making the member ineligible to run against Mireles. Ruff named Boardman, Mireles's Coordinator,. as the person who told Ruff and others that it was time to miss a dues payment. Elaborating, Ruff said that he thought that not only he but others had conformed to this policy but that one night at dinner Sevilla said he was not going to accept the policy and this led to a fist fight between Sevilla and Ruff. Ruff thought Mireles would be upset about this but instead Mireles, apparently pleased that Ruff had supported the policy, rewarded Ruff with a new car. Later the same day, October 8, 1996, Boardman testified. IRE- Ex. 1 (at E. 4). He, like Ruff, was no longer a member of Local 952. He stated that he had helped elect Mireles in 1989 and when Mireles took office in January 1990 as Local 952's Secretary-Treasurer, he named Boardman as his Coordinator. A11 the Business Agents reported to him. He stated that, at the direction of Mireles, after Business Agents had gone to self-pay in early 1990, he had been directed by Mireles to

implement the dues policy (which included having the Business Agents go on self pay of dues instead of check-off and then miss a dues payment so that they would be ineligible to vote or run for office). He added that there had been a fight over this policy between Sevilla and Ruff, and that Ruff got a new car out of this, as Ruff had testified.

McDonald was the other witness whose sworn testimony was taken on October 8, 1996 by Zahner. IRB-Ex. 1(at E. 11). It is noted that, unlike Ruff and Boardman, McDonald did not later testify in 1998, but he did testify before us on April 17, 2000, as did Ruff and Boardman. He was a member of Local 952 in 1996 and worked as a Business Agent for only a short time, from February 1996 to July 1996. He decided to terminate his position because there were many things about the Local he did not like. Having previously heard from Ruff and Boardman about the dues policy, Zahner asked McDonald if there was such a policy and he answered that there was. He stated that Roa (Boardman had by now left Local 952) was now the person who told everybody that they had to miss a month s dues. When McDonald asked Roa why this was so, Roa told him that this meant he would not be eligible to run in the next election. McDonald said Roa possessed two guns. Tying in with what Ruff and Boardman had testified about, what led to a fight between Ruff and Sevilla, McDonald said Sevilla complained all the time about the dues policy but that he, McDonald, felt that Mireles nonetheless kept Sevilla because of his experience as a Business Agent.[3]

Ruff gave sworn testimony to the Chief Investigator again on September 28, 1998 and Boardman again on September 2,

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[3] Ruff, Boardman and McDonald were not subject to the same impeachment that Sevilla, Frias, Barnes and Smith faced when they testified in 1998, *see* pp. 11-16, *infra,* and Sevilla and Smith faced when they testified before us, that is, that they had lied in their 1996 testimony. *See* pp. 22-26, *infra.*

1998. Before examining their 1998 testimony, however, we shall first examine other testimony given in 1996 by Local 952 members to Zahner, the Chief Investigator's counsel.

The first of this group was Barnes, who testified on October 11, 1996, three days after Ruff, Boardman and McDonald had testified. IRB-Ex. 1 (at E. 39). Unlike the procedure three days before, Barnes was accompanied by Robert M. Baptiste ("Baptiste"), her counsel.[4]

As Office Manager Barnes supervised the office staff. She was asked by Zahner about Local officers signing blank checks; vacations; use of the Local's automobiles; guns; credit cards and use for personal expenses; and tickets for sports events. No questions were asked about the dues policy.

Frias also testified on October 11, 1996. She was also accompanied by Baptiste. She told Zahner she was a trustee of the Executive Board of Local 952. She never saw a woman named Kim Barton drive Mireles' car; she never saw a gun on the Local's premises; she did not use a Local credit card; and she was never asked to contribute to Mireles' campaign fund. She also was asked about sports tickets. As with Barnes, Zahner asked Frias no questions about the dues policy of the Local.

Smith also testified on October 11, 1996, accompanied by Baptiste. IRB-Ex. 1 (at E. 40). As with Barnes and Frias, Smith was not asked about the Local 952's dues policy. She was a Trustee and Business Agent of Local 952. She was asked about the Local's vacation policy; use of Mireles' car by Kim Barton; use of credit cards; contributions to Mireles' campaign fund (she said it was voluntary) and sports tickets.

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[4] Baptiste also appeared as counsel for others who testified on October 11, 1996: Mireles; Smith; Sevilla; and Frias. When Roa testified before the Chief Investigator on September 28, 1998 and Mireles on that same date testified again, Baptiste represented both. Baptiste represented no one else in their 1998 testimony.

Sevilla was the next and last to testify on October 11, 1996; he was also accompanied by Baptiste. IRB-Ex. 1 (at E. 37). Sevilla said he was a Business Agent of Local 952. He, too, was asked about the Local's vacation policy and whether he knew Kim Barton and whether she had driven Mireles' car (he said he had not seen her do this). Zahner then departed from her procedure with the previous witnesses that day and asked if he, Sevilla had ever missed paying monthly dues. (It is noted that on October 8, Ruff and Boardman had told Zahner not only about the dues policy but also Sevilla's resistance to it, and about the fight it led to between Sevilla and Ruff.) He said he had, but that he was not encouraged to do so. He said there was no particular reason for having missed the payment, and Zahner did not pursue the matter further. He too was asked about credit card use and campaign contributions for Mireles (he said Boardman asked him to make a contribution but no pressure was put on him to do so) and was asked about tickets.

Mireles also testified before Zahner in 1996. *See* p. 16, *infra.*

2. The 1998 Testimony

In 1998, the Chief Investigators Special Counsel, Milton, took sworn testimony of the individuals named above and others.

In 1998 Ruff and Boardman repeated the. testimony they had given in 1996 about the existence of the missed dues scheme that began in January 1990, when Mireles became Secretary-Treasurer. Ruff IRB-Ex. 1 (at E. 7); Boardman IRB-Ex. 1 (at E. 5).

On September 1, 1998, King gave testimony before Milton, as did Wiley on September 2. IRB-Ex. 1 (at E. 10); IRB-Ex. 1 (at E. 9). Neither had testified previously. Both were Local 952 Business Agents and both stated that, after Mireles became Secretary-Treasurer of Local 952 in 1990, they had

been moved from payment of dues by check-off to self-pay and that this was followed by their being told by Boardman to miss their dues before election. King said that the purpose behind this was to insure that the Business Agents would not be eligible to run against Mireles.

Sanzaro also gave sworn testimony to Milton on August 31, 1998. IRB-Ex. 1 (at E. 14). Like King and Wiley, she had not testified before. She had become the Local 952's Office Manager in 1996, after Barnes retired. She was aware of the Local's dues policy, that Business Agents were to miss at least one month's dues within a 24-month period, and that the purpose of that was so that they would not be eligible to run for office. After she succeeded Barnes, she was directed by Roa (Boardman had left the Local) to give a TITAN printout of each Business Agent to him. Roa told her Mike Pharris ("Pharris") (a Business Agent) was going to miss a payment in February and would pay in March (of 1997). She was led to believe by Roa that if the Business Agents did not miss their dues payment, they would be terminated.

We now turn to the 1998 sworn testimony of Sevilla and others who had been represented by Baptiste when they testified in 1996, but were not now.

Led by Sevilla, Barnes, Frias and Smith decided in 1998 to contact the Chief Investigator so that they could correct their 1996 testimony. It appears it was less their conscience that moved them all in this direction than the fact that they were unhappy with Mireles' management of the Local's affairs, and Sevilla admitted that he wanted to regain eligibility since he was thinking of joining with the others to defeat Mireles in the upcoming election. As Smith put it in her testimony before us, she and the others were concerned "that the Local was [not] running properly and that . . . pretty much the only

way that we could get justice was to go to the IRB." Tr. at 278. Sevilla was the "coordinator" of this effort. *Id.*[5]

Frias and Smith, who had not been asked about the Local's dues policy in 1996, gave sworn testimony to Milton on August 31, 1998. IRB-Ex. 1 (at E. 15) ; IRB-Ex. 1 (at E. 12). Each admitted she had lied in her 1996 testimony, Frias when she testified she had used the Local's sports tickets (she had not), and when she denied having seen any officer of the Local having a gun in his possession (she had, in Roa's possession); and Smith when she said she had never seen any Local employee in possession of a gun (she had, in Roa's possession) and when she testified that her contributions to Mireles' campaign fund were voluntary (they were not voluntary, they were a condition of employment and were picked up first by Boardman and, after he resigned, by Roa). Both Frias and Smith explained their deception in the 1996 testimony on their being fearful of Mireles, who immediately after Baptiste left the room, and immediately before they testified on October 11, 1996, told Frias, Smith, Barnes and Sevilla words to the effect of "you know how to testify at tomorrow's hearing, don't you?" Frias, IRE-Ex. 1 (at E. 15,); Smith IRB-Ex. 1 (at E. 12).[6]

Both Frias and Smith went on to testify in 1998 about the Local's dues policy, confirming what Ruff, Boardman and McDonald had first testified to in 1996. Smith was particularly expansive on the subject. Smith had heard Boardman tell Business Agents that they had to miss their dues, at a time when he was speaking to Ruff and Sevilla, and would be

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[5] King's, Wiley's and Sanzaro's support in this movement against Mireles was apparently also sought and obtained by Sevilla, Barnes, Smith, Frias and Ruff.

[6] There is nothing to indicate nor do we suggest that Baptiste was involved in what we perceive to be an effort by Mireles to do "damage control" by warning that the witnesses should not give testimony hurtful to Mireles or the Local.

terminated if they did not. This was to insure that the Business Agents would be ineligible to run against Mireles in the next election. Smith said the policy was still in existence in February 1998, having heard Roa tell Pharris he had to miss his dues.

Barnes also gave testimony to the Chief Investigator, on September 2, 1998. IRB-Ex. 1 (at E. 8). As was the case with Frias and Smith, she had not been asked about the dues issue in her 1996 testimony. She now admitted that she had testified falsely in 1996 about use of the sports tickets, out of fear that telling the truth might have cost her the consulting agreement she had just entered into with Mireles and the Local. Barnes, as the Office Manager of Local 952 before and after Mireles became Secretary Treasurer, handled the TITAN system for the Local. Business Agents were, prior to 1990, on dues check-off. When Mireles became Secretary-Treasurer he made Barnes the Office Manager—this was January 1990—and shortly after that he instructed her to remove all Business Agents except Boardman (who was also Coordinator at the time) (and Mireles) from dues check-off and put them on self-pay. He did not answer her question as to why he was ordering this. Later she learned the reason for the changes. It was because the Business Agents, now that they were paying dues personally, could be directed to miss a month's dues so that they would not be eligible to run for office and their compliance could be monitored by reviewing the. TITAN records. Later she heard Boardman was the person designated by Mireles to tell the Business Agents to miss dues payments. She remained in charge of entering the dues status of each Business Agent in the TITAN system and Boardman would have her give him printouts of a Business Agent's TITAN record. Boardman would then give the printouts to Mireles. Barnes mentioned that one Business Agent, Sevilla, tried to beat the system by paying his dues the last day of the month, so the payment would not be reflected in the TITAN system until the next month, but she would

give him a handwritten receipt to show the timely payment of dues. There came a time when three Business Agents who were also on the Executive Board, Ashley, Hahn and Smith, were, at Mireles' direction to Barnes, put back on check-off. Smith had missed a monthly self-pay payment which would have made her ineligible to vote for the Mireles slate of candidates (of which she was one). However, Mireles told Barnes to give her a receipt to show she had paid when in fact she had not.

Sevilla also testified in 1998. IRB-Ex. 1 (at E. 13). Of the group led by him, only he had been asked about dues payments in 1996. He now admitted he had lied in 1996 when he said he had not been encouraged to miss dues payments (he said it was required, with Boardman telling him first and Roa thereafter to miss his dues under threat of termination). He also lied when he said there was no pressure on him to contribute to Mireles'' campaign. Boardman first, and later Roa, told him he had to contribute. He lied too when he denied ever seeing an officer or Business Agent with a gun (he saw Roa with one which he carried in an ankle holster). Asked why he had lied about these matters, he referred to the same direction from Mireles to which Frias and Smith had referred. It was clear to Sevilla that Mireles was suggesting he lie as to the subjects they had discussed at the pre-testifying meeting as likely to arise in the Chief Investigator's examination. Sevilla confirmed Barnes' statement about getting a handwritten receipt for payment of dues the last day of the month.

Mireles, accompanied by Baptiste, testified before the Chief Investigator's representative both in 1996 and 1998. IRB-Ex. 1 (at E. 1 and E. 2). In 1996, he was asked about the Local's vacation policy and his vacation time; use of his car by Ms. Barton; use of the Local's credit card; his travels; his expenses; guns; the extent he reviewed TITAN printouts (he said he reviewed them only to make sure the Business Agents

delegates and alternates to the IBT 1996 convention were eligible) ; he said they have to have their dues paid on time in the 24 months prior to the convention and he did not recall any problems with any Business Agents not having been paid up. He never encouraged any Business Agent to miss a month's dues and there was no requirement that Business Agents who were not officers must miss a month's dues in a 24-month period preceding an election. He denied there was a requirement that Local employees had to make political contributions.

Mireles testified again in 1998 on September 28, again accompanied by Baptiste . IRB-Ex. 1 (at E. 2) . By this date all of the people named above had given their 1998 testimony except for Ruff (who also testified on September 28, 1998, but who had testified in 1996 about the dues policy that had been inaugurated in 1990 when Mireles took office). Mireles confirmed that he was elected Secretary-Treasurer in 1989 and took office in January 1990. He professed to know very little about how, when he took office, dues were paid. Contrary to Barnes' testimony, he never told anyone in the Local that Business Agents should be moved from check-off payment of dues to self-pay. More specifically, he denied he ever told Barnes that dues of Business Agents were to go from check-off to self-pay. He did not recall telling Barnes to give Smith a handwritten receipt for a late payment that indicated it was timely. There has been no system while he has been Secretary-Treasurer to encourage Business Agents to miss a monthly dues payment. Others of course, had already testified that Boardman first, and then Roa, told Business Agents to do so, and Respondents have not offered any explanation of this, leaving it open to infer that it was done pursuant to Mireles' direction. He denied he directed that Smith be put back on the check-off system of dues payment (because she was on the Executive Board). He did not know how many Business Agents were on check-off in 1992, 1993, 1994 or 1995. He never told Boardman to tell

Business Agents to miss one month's dues payment. He explained his limited review of the TITAN printouts as mentioned in his 1996 testimony. He never reviewed TITAN printouts with Boardman. He never told Sevilla he was aware Sevilla was paying his dues the last day of the month. He did not meet with Business Agents in 1996 prior to the Chief Investigator's examination (at odds with the testimony of Smith, Frias and Sevilla).

Roa was also examined by Milton on September 28, 1998, and was, like Mireles, also represented by Baptiste. IRB-Ex. 1 (at E.3). He became a Teamster in 1979 and became employed by Local 952 in January 1990 as a Business Agent and organizer, hired by Mireles. He had some discussion with Boardman that Business Agents had to miss a monthly dues payment within 24-months prior to the Local election, but it was not a requirement. After Boardman left the Local, Roa stated that he probably had general conversations with Business Agents about missing monthly' dues payment but he did not recall telling any Business Agent he would have to miss a monthly dues payment nor did he recall telling Patton he would have to miss a dues payment. He denied telling Smith there was such a policy. He never told Frias he was about to tell Business Agents they needed to miss a month's dues. He denied telling Pharris he needed to miss a month's dues. He never asked Sanzaro or anyone else for a TITAN dues printout of Business Agents. He does own two guns but he never told any Business Agent he carried a gun while on the Local's premises. After Boardman left, he collected voluntary contributions for Mireles' campaign. He does not have a permit or license to carry a weapon. He did not recall when he first became aware that Business Agents in Local 952 were not being current in their dues. He then stated he might have said to Pharris and McHugh that "it was that time again, " but added that they were only talking in general. He knew the consequences of missing a dues payment within two years prior to election; you would not be eligible to run for an

officer position. Boardman told him that it was being part of a team to miss dues but he says he did not know the full deal at that time. He has never been responsible for seeing to it that Business Agents are current in their dues payments. He has never said to a Business Agent he would have to miss a monthly dues payment.

All of the foregoing transcripts of the testimony taken by the Chief Investigator's counsel, Zahner in 1996, and Milton in 1998, were admitted in evidence in the matter before us and we have deemed this testimony to be reliable hearsay under all the circumstances, overruling the Respondents' objection on that basis.[7] We will deal with the overall credibility of the witnesses in the light of all the evidence before us.

Finally, the Chief Investigator's recommendation to the IBT, at p. 1, *supra*, was also based on Local 952's TITAN dues records, which were also put in evidence before us, and to which we have referred and will refer. CI 9-32.

B. The Testimony Before the IRB

1. *The Evidence from the Chief Investigator*

Local 952 had Local officer elections in 1992, 1995 and 1998. The TITAN records before us reflect that, from the change of method of payment of dues by at least March 1990 until the filing of these charges in November 1998, no Business Agent on. the self-pay system was eligible to run in the 1992 Local 952 officer election, one Business Agent (who retired the end of 1995) on the self-pay system was eligible to run in the 1995 Local 952 officer election, and no Business Agent on the self-pay system was eligible to run in the 1998 Local 952 officer election. CI 9-32. This change to a self-

[7] Here we refer to the testimony of all of the witnesses except Mireles and Roa. Their counsel did not object to the admissibility of their testimony.

pay system served no union purpose. We conclude that the only purpose as illuminated through the testimony and corroborated by the records was to make it possible for Mireles to eliminate the threat of Business Agents running against him in subsequent elections.

As we have seen in her sworn testimony in 1998, one witness who detailed Mireles' scheme was Barnes, the Office Manager of Local 952 from January 1990 until her retirement in September 1996.[8] *See* pp. 14-16, *supra*.

Notwithstanding Barnes' having admittedly lied in 1996, *see* p. 14, *supra*, we credit her testimony given to the Chief Investigator in 1998 in that it draws support from other testimony and the TITAN records.

Ruff's testimony before us was more detailed than in 1996 and 1998 and we had the opportunity t o observe him and we found he told the truth not only before us but also in his 1996 and 1998 sworn testimony. *See* pp. 7-8, it *supra*. He also confirmed the existence of the dues policy. Tr. at 175 He worked on Mireles' campaign in 1989. Tr. at 167. At a meeting prior to the election in 1989, at which Ruff, Mireles and Boardman were present, Mireles said that once they were elected, they would be in office "forever." *Id.* In Mireles' presence, Boardman explained that the only way they could lose would be if someone from their slate ran for office against them. Boardman stated to prevent that they would have the staff miss a month's dues, thus making the staff ineligible to run. Tr. at 168-69; IRB-Ex. 1 (at E. 7).

When Ruff joined Local 952 in January 1990, he was on the dues check-off system. Consistent with Barnes' testi-

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[8] As has been noted, Sanzaro replaced Barns as the Office Manager. *See* pp. 12, *infra*. Her testimony in 1998 was supportive of that given by Barnes. A description of her testimony with regard to Roa's role in continuation of the policy after Boardman's departure is set forth below. *See* pp. 39-40, *infra*.

mony, he was put on self-pay in February 1990. Tr. at 170. In early 1991, Ruff overheard a conversation between Mireles and Boardman outside his Local office; Mireles told Boardman it was time to meet with the Business Agents and have them start missing their dues payments, but not to have everybody miss at once. *Id.* at 171.

Further, according to Ruff, Boardman immediately after this told Ruff that he needed to miss his dues payment and Ruff produced a dues payment receipt which reflected that Ruff had recently missed two payments. Later, when Mireles, Boardman and Ruff were in Mireles' office, Boardman told Mireles he had met with the Business Agents and delivered his instruction. He also said that Ruff had already missed two month's payments; Mireles and Boardman laughed. Tr. at 171; IRB-Ex. 1 (at E. 7).

Turning to the confrontation Ruff had with Sevilla, according to Barnes, Sanzaro and Sevilla, Mireles' requirement of Business Agents missing a dues payment was not readily accepted by some Business Agents. Sevilla found a flaw in the scheme which allowed him to remain in good standing although he would appear from the computerized records to have made a late payment. Sevilla knew that Barnes routinely closed down the TITAN system at 4:00 p.m. to enable the staff to close out and balance entries for the day. On several occasions, on the last day of the month Sevilla made a dues payment to Barnes after the TITAN system had closed, but while the office was still open. Barnes then gave Sevilla a handwritten receipt confirming his dues were paid that day. However, the entries on the TITAN system, entered days later, would appear to indicate a late payment. Tr. at 76; Tr. at 172; IRB-Ex. 1 (at E. 8); IRB-Ex. 1 (at E. 13); and IRB-Ex. 1 (at E. 14).

Ruff confronted Sevilla when he learned of Sevilla's ruse to circumvent Mireles' ineligibility scheme. As a result, in October 1994 or 1995, Sevilla and Ruff were involved in a

fist fight away from the Local's premises over this. Tr. at 79 and 172; IRB-Ex. (at E. 7). Smith was present at this altercation. Tr. at 226.

Ruff then said that, one month later, Mireles called Ruff into his office to discuss the fight. Boardman was present. After Ruff described what happened, Mireles directed Boardman to get Sevilla's TITAN dues printout. Boardman retrieved the printout. Mireles then advised Ruff he appreciated his loyalty. Boardman returned with the printout, which he and Ruff examined. Mireles then ordered Boardman and Ruff to check the hand receipt books in the clerk's office to determine whether Sevilla had received any. The book showed that Sevilla had received a hand receipt on at least one occasion. Tr. at 73-75; IRB-Ex. 1 at E. 7).

A short time after this meeting, Mireles called Ruff into his office. He again told Ruff that his loyalty was appreciated. Mireles told him to go with another Business Agent to select a new car, which would be assigned to Ruff. (Tr. at 175).[9]

Ruff stated that Mireles's policy of requiring a missed dues payment was first enforced by Boardman "and when Jim Boardman left, he (that is, Mireles) had Paul Roa enforce it. *Id.* at 176. Roa told Ruff he now had that responsibility. *Id.*

While it is true that Ruff was ultimately fired by Mireles, ostensibly for using a Local credit card for personal expenses, and admitted that at a point close to his termination in June

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[9] At his sworn IRB examination Mireles testified that he assigned a new Local-leased car to Ruff because he thought Ruff "had wrecked his car, and we had to get another one. As I recall, I think he had several wrecks, and to repair that year of vehicle, it was decided that we're going to get a new one." IRB-Ex. 1 (at E. 2). However, Ruff testified that the car assigned to him was in "[g]ood condition. It was fine, perfect working order. It was a 1989 Ford Crown Victoria in good working order and shape, nothing wrong with it." IRB-Ex. 1 (at E. 7). We did not find Mireles' explanation credible.

1996 he had psychological problems, we found his testimony credible and supported by the testimony of Boardman, King, Wiley, Sanzaro and others, and of course, the TITAN records. We do not overlook the fact that Ruff also testified that Mireles himself never told Ruff he had to miss dues or threatened him if he did not. Tr. at 210. The fact is that the testimony overall persuaded us that Mireles worked this scheme through Boardman and later Roa.

Smith, repeating much of which' she had testified to in 1998, *see* pp. 13-14, *supra*, also gave testimony before us. As with Ruff, we observed her testimony and found her a credible witness, not only in the testimony she gave before us but also in 1998. She confirmed the scheme, as she had also done in her 1998 sworn testimony before the Chief Investigator's counsel. Tr. at 216 *et seq*. She became employed at Local 952 as a Business Agent and Trustee on January 2, 1990, when Mireles became Secretary-Treasurer. Tr. at 217; IRB-Ex. 1 (at E. 12). The TITAN dues printout for Smith reflected that her dues were paid on a check-off basis for January 1990 (the month she began working for the Local). Tr. at 219. Thereafter, she was on a self-pay basis from February 1990 through February 1993, returning to a check-off basis (because of her Executive Board status) from March 1993 to the present. *Id.*; Tr. at 224 (Ex. CI-29). As seen in Smith's TITAN dues printout record, while she was on the self-pay system, she failed to pay her dues on time in April 1991 and May 1992. *Id.*; Tr. at 221-22; IRB-Ex.1 (at E. 8). These failures made her ineligible to run for Local office in the December 1992 election. Mireles told her she was not to miss her dues because she was on the Executive Board. Tr. at 223. Smith testified that Mireles gave her a false handwritten receipt in 1991 and Barnes prepared a false receipt in 1992 to create the appearance of timely payments in order to establish her eligibility to run for Local office. Smith, who ran on

Mireles' slate, was elected to a Trustee position in the 1992 election.[10]

At one point, she asked Mireles why she had been put on self-pay, to which he merely said "We had to be on self-pay." Tr. at 222.

In 1994, Smith observed Boardman going into the two offices next to hers. She overheard him tell their occupants, Business Agents Ruff and Sevilla, that they had to miss their next month's dues payment. IRB-Ex. 1 (at E. 12). She also heard this at a meeting of Business Agents. Tr. at 220.

Smith witnessed the fight between Ruff and Sevilla. Tr. at 226.

Smith testified that after Boardman left the Local at the end of 1995, this scheme continued. Tr. at 230. In February 1996, Roa, while sitting in her office, admitted he was instructing the Business Agents to miss their dues. *Id.* He stated that "I don't like doing this but Eddie told me I have to do it . . . ." Tr. at 232. Smith also heard Roa tell Pharris that he needed to miss his dues that very day. (Tr. at 284)

We accept Smith's testimony as credible notwithstanding her false testimony in 1996, and the impeachment of her testimony by Respondents in the hearing before us. Tr. at 234, *et seq.*

Smith explained why she lied in 1996. It was out of fear of Mireles. *Id.* at 227-29. Curiously, she said she had lied about "the dues issue" in 1996. *Id.* at 229. However, it appears from the transcript of that testimony that she was never asked about that issue.

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[10] It will be recalled that Barnes has testified that, at Mireles' direction, she gave Smith a backdated hand receipt which purported to show that Smith was not late in making her dues payments, although in fact she had been. Tr. at 16; IRB-Ex. 1 (at E. 8).

Again, notwithstanding her lying in 1996, and the reasons she conceded she had for having a prejudice against Mireles, *Id.* at 238-257,[11] we ultimately concluded she was a truthful witness before us and in her 1998 testimony, based upon our own impression of her as a witness as she testified and the several elements in the evidence that were consistent only with her telling the truth in 1998 and before us.

Another witness to the dues scheme was Michael Patton, whom Mireles called at the hearing before us. Patton started working for Local 952 in August 1994. Tr. at 586. Former Business Agent Wiley, while training Patton, told him they were not on dues check-off because they were required to miss their dues once every three years so they could not run against "the boss." *Id.* at 587. Patton had made late dues payments from 1994 through January 1999. Tr. at 587 Patton's testimony corroborated the testimony of Boardman, Seville, Barnes, Wiley, King and Smith that Mireles implemented and maintained this scheme. Wiley's statement to Patton in 1994 came at a time long before the start of the IRS investigation and is corroborated by TITAN records. CI 9-32. Mireles and the Local's officers were the only beneficiaries of this scheme.

Seville also testified before us. At the time of his testimony on April 17, 2000, he continued to be a Local 952 Business Agent. He paid his dues by check-off until early 1990 when he went t o a self-pay method. *Id.* at 69-70. He had been told by Boardman this was going to happen. *Id.* at 71. He was also told that "we would have to miss one month's dues within the 24 month period prior to the nomination." *Id.* Sevilla talked to "Eddie about it." Tr. at 72. He told Mireles this was not right, requiring a missed dues payment, but Mireles just "let me out

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[11] As noted, she had joined with Seville, and others who decided they wanted to remove Mireles and that this led to contacting the Chief Investigator to correct her 1996 testimony. Tr. at 258, 277-78.

the door." *Id.* at 73. He knew the reason for missing the dues payment; so that he would be ineligible to run for office. *Id.* at 75.

He then had the idea of paying his dues. the last day of the month, so that his payment would not be in the TITAN records, but he would get a handwritten receipt from Barnes, the Office Manager, to show the payment. Id at 75-76.[12]

Later Mireles told him he had found out about the last-day-of-the-month method of payment. *Id.* at 77. He then described his fight with Ruff after he told Ruff he was stupid for going along with Mireles' scheme. *Id.* at 79.

Sevilla next described the meeting that preceded his and others (Barnes, Frias, Smith) giving their testimony before Zahner in 1996. *Id.* at 82-3. He admitted he lied when he said he was not encouraged to miss paying his dues. *Id.* at 85.

He then described what led him and the other to contact the Chief Investigator in 1998 so that they could correct the testimony they had given in 1996:

> . . . none of us were eligible to run, we were really dissatisfied with Mr. Mireles' performance. (sic) was 1996 hearings had been on my mind for a long time. I made, I made up my mind that I was going to do something about becoming eligible for office, and there was (sic) a couple of avenues, so I came to the IRE.[13]

Id. at 86-7.

After Boardman left Local 952, Roa told Sevilla that he now had the responsibility with regards to the missing of dues payments by Business Agents. *Id.* at 88. Roa told him "I'm doing what Eddie is telling me to do." *Id.* at 89.

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[12] It must be noted at this juncture that during the relevant time period in this matter, Sevilla was often late in paying his dues. Tr. at 98-110, 127.

[13] This led to Barnes, Frias, Smith and others joining him in correcting their 1996 testimony. Tr. 132-33.

We found impressive the cross examination of Sevilla by Respondent's counsel in demonstrating Sevilla's animus toward Mireles and his questionable motives in changing his 1996 sworn testimony. However, the fact remains that there was overwhelming evidence from other witnesses and from the TITAN records that corroborated Sevilla's testimony about the dues scheme.

The Chief Investigator next called McDonald as his witness. He repeated much of what he had testified to in 1996. IRB-Ex. 1 tat E, 11); pp. 8-9, *supra*. After he joined Local 952 in 1996 he was on self-pay and was told by Roa that he had to miss a month's dues, Tr. at 294. He complained about this to Harry Ashley, President of Local 952, but Ashley said "that's a part of the program. It you don't like it, go talk to the boss." *Id*. at 96. He was at Local 953 only for 5-6 months and left because there were a lot of things he did not like about what was happening. *Id*. at 298. It is noted that Sevilla contacted him in 1998 and asked him if he would is k to the IRE and he said he would and he had many discussions with Sevilla about this. *Id*. at 303. We found McDonald credible and accepted his testimony as true.

2. *The Evidence From the Respondents*[14]

We have carefully considered the testimony of the witnesses called by the Respondents and the Respondents themselves. The testimony of Hoffman, if accepted, only indicates what Sevilla to a degree at least, has admitted, namely that he decided he wanted to unseat Mireles and went to the IRB in 1998 to change his 1996 testimony. Other than that, she suggested that the law firm she worked for had betrayed its clients, Local 952 and Mireles, and that she, Hoffman, had left that firm. Tr. 306-54. She shed no light at all on the issues involved in the charges, that is, why did

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[14] The Respondents called Patton and we have discussed his testimony. *See* p. 27, *supra*.

Business Agents go from check-off to self-pay after Mireles took office and whether Mireles directed that Boardman and later Roa make the Business Agents miss a dues payment.

Ashley was also called by the Respondents. Tr. 354. He started with Local 952 in January 1990 and retired in February 2000. *Id.* at 358. He denied that McDonald ever discussed the so-called dues policy with him and said he was unaware of such a policy. *Id.* at 359. No one at Local 952 ever discussed with him a policy of missing dues. *Id.* at 363. He first became aware of the charges in this matter in the fall of 1998 but did not discuss them "much" with Mireles. Contrary to his testimony on direct examination, on cross-examination he conceded that in January 1990 he was on dues check-off. *Id.* at 378. It was right after he got into office that he started paying his own dues. *Id* at 378. He then agreed his TITAN records showed he was on check-off in January 1990 and changed to self-pay in February or March 1990, *Id.* at 379, which of course is again established the basic premise of the charges. No one ever told him why the system changed. *Id.* at 380. He knew the Business Agents went on self-pay but he never asked anyone why the change was made. *Id.* at 383: "All I know is Mr. Mireles told us we were on self-pay and we had to pay our dues." *Id.* Once the charges came down, he did not believe he had a duty to investigate nor did he investigate. *Id.* at 384.

He was placed on check-off in 1993 as a member of the Executive Board. *Id.* at 385. It is noted Smith was as well. *Id.* at 224. However, Ashley did not discuss with anyone why he had been moved from self-pay to check-off at this time. He never received TITAN dues records and never knew of anyone who was late in his or her dues. *Id.* at 387.

We found it difficult to credit Ashley's testimony except as it supports the Chief Investigator's contention that there was a shift from check-off to self-pay of the Business Agents in early 1990 at Local 952.

The Respondents also called Fitzgerald. Tr. at 393. He testified that he came to work at Local 952 in 1990 as a Business Agent and early that year told Barnes he could not carry people on check-off without a signed authorization. *Id.* at 395. He said no one was told not to pay their dues. *Id.* at 396. On cross examination Fitzgerald, shown his TITAN dues record, stated that he had been fined for a late payment. *Id.* at 401. As with Ashley, we determined we could not credit Fitzgerald's testimony. It was unsupported by anyone. Moreover, it was at odds with the credible evidence we found supported the charges.

The Respondents also called Anderson as a witness. *Id.* at 404. He started at Local 952 in September 1996 as an organizer. *Id.* at 405. He first said he had heard Boardman in the hall outside the hearing room on the first day of our hearing say he was not going to testify because he was not going to perjure himself. *Id.* at 405. Then he added that when he began work in 1996 as an organizer he was told he had a choice of going on check-off or self-pay. We gave his testimony little weight, although it gave us cause for a concern about Boardman whom the Chief Investigator had apparently decided not to call as a witness.

Thus, we called Boardman as the IRS's witness. Tr 418. We read to him the testimony he had given in 1996 implicating Mireles in directing him to insure that the Business Agents missed a dues payment, relating how Seville had boasted he "found a way around the system," leading to a fight between Sevilla and Ruff, and had him state whether this testimony was true. He stated it was. *Id.* at 421-22. Respondents' counsel then cross-examined Boardman and was effective in showing Boardman's animosity toward Mireles. *Id.* at 422-51. We upheld the objection of Respondents' counsel to questions being asked by the Chief Investigator's Special Counsel because the former stated he had been led to believe "Boardman was not going to testify." Tr. at 454.

We then asked of Boardman what, if anything, he had said about perjuring himself, referring to testimony given by Anderson. *Id.* at 456-57. We satisfied ourselves that Anderson had misunderstood what Boardman had said and accepted as credible Boardman's 1996 and 1998 testimony.

The Respondents also called Arce, currently the office Manager of Local 952. Her testimony added nothing. *Id.* at 550-53.

Mireles' testimony before us was substantially the same as in 1996 and 1998 and consisted primarily of denials of what the several witnesses had said. For example, Mireles testified that he held campaign meetings at his Anaheim home in 1989 but denied the testimony by Ruff that they had discussed a plan to have Business Agents miss dues so as to render them ineligible to run for office. *Id.* at 466-67, 470. Mireles also denied that he had told Barnes to take all of the Business Agents (except Boardman and himself) off dues check-off, thereafter making an exception for members of the Executive Board. *Id.* at 471. Mireles claimed that until the issuance of the IRB Report in 1998, he was unaware that Smith had been delinquent in her dues. *Id.* at 472. Mireles also claimed he did not keep track of the payment of dues by Business Agents and did not direct Barnes to give Boardman TITAN reports. *Id.* at 472.

Mireles testified that he did not instruct any Business Agent of Local 952 to miss his dues payments and that none of his staff, including Business Agents, ever came to him and questioned him about having to miss dues payments. *Id.* at 503.

Mireles testified that he did not instruct Boardman to bring him copies of TITAN reports, nor did he instruct Sanzaro to provide TITAN reports to Roa. *Id.* at 504-505. Mireles claimed he never told Boardman if he did not like the policy of Business Agents missing dues, he could seek employment

elsewhere. *Id.* at 506. Mireles stated Boardman did not report to him on Ruff's dues payment status and also denied having a conversation with Boardman about Ruff's dues payments. *Id.* at 506, 510. Mireles again denied having told Barnes to place the Executive Board members on dues check-off in 1993. (*Id.* at 509). Mireles claimed that, after his 1996 deposition, he did not review any TITAN records to see what Business Agents were not on dues check-off.[15] Mireles maintained that he learned of the allegation that the Local's Business Agents were told to go on self-pay, and instructed to miss a monthly dues payment so they would be ineligible to run for union office, only when he received the IRB charges in October 1998. *Id.* at 525. Mireles also denied having any discussions with Smith concerning the payment of her dues, and denied causing the issuing of a handwritten receipt to her for a late dues payment. *Id.* at 533-34. We did not find Mireles to be a credible witness. Not only was his testimony inconsistent with the testimony of numerous witnesses—in each case he had denied what another witness said—but we found him to be evasive and non-responsive to questions critical to the case. Finally, we found it totally unacceptable that he seemingly knew so little about what was going on in his union.

Turning now to Roa's testimony before us, Roa joined Local 88 in 1979 and transferred into Local 952 in 1981. Tr. 554-55. Roa was a shop steward at the Alpha Beta grocery chain. On January 2, 1990, he became a Business Agent of Local 952. *Id.* The balance of his testimony before us was not substantially different from that given by him in. 1998. Tr. at 18-19.

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[15] With regard to the International convention, Mireles testified that he reviewed the TITAN records of all the Local 952 delegates but conceded that each of the 14 delegates was either an officer on dues check-off or a steward whose dues the Local paid. Tr. at 524, 540-41.

The charge against Roa alleged that from 1996 to the filing of the charges in November 1998 Roa required other Business Agents to miss a monthly dues payment to render them ineligible to run for office in the next Local Officer election.

As has been set forth herein, the testimony of Boardman, Barnes, Ruff, Sevilla, Wiley, Patton, King, McDonald, Sanzaro, and Frias, along with the TITAN records, was to the effect that Mireles implemented and maintained a scheme which required Business Agents not on dues check-off to miss a monthly dues payment to ensure ineligibility. The Local 952 TITAN dues printouts established that, with one exception, all the Business Agents missed a monthly dues payment from 1996 through 1998. (CI 9-32, CI 43-46). Five witnesses, Local 952 Business Agents Smith, Sevilla and Ruff and former Local 952 employees Sanzaro and McDonald, all testified that Roa assisted Mireles in ensuring the scheme's continuation.

According to Smith, after. Boardman left the Local at the end of 1995, Roa assumed some of his duties; and in February 1998, Roa told Smith he was telling the current Business Agents to miss their dues. Tr. at 232; pp. 14, 24-27, *supra*. Smith heard Roa tell Pharris that he needed to miss his dues, and that he had to do it that day. IRB-1 (at E. 12).

Smith also testified that Roa told her he was not happy about his responsibility, telling her, "I don't like doing this but Eddie told me I have to do it, so I have to do it." Tr. at 232. Given all the evidence, we reject Roa's testimony that he never complained to Smith that he was unhappy with the task of telling Business Agents they were required to miss making timely dues payment. *Id*. at 580.

Sevilla also testified that Roa was Boardman's successor. After Boardman left the Local, Roa instructed Sevilla to miss a month's dues payment. Tr. at 88-89; and IRB-Ex. 1 (at E. 13).

Turning to Sanzaro's testimony Ex IRB-1 at E. 14; *supra*, at 13. She too implicated Roa in carrying out Mireles's scheme after Boardman left. IRB-Ex. 1 (at E. 14); p. 12, *supra*.

In early 1997, Roa told Sanzaro that he was in charge of the missed dues payment policy, and had instructed Pharris to miss his dues payment that month and to make the late dues payment directly to Sanzaro. The Local 952 TITAN dues printout reflected Pharris missed his dues payments for the months of February and March 1997. IRB-Ex. 1 (at E. 14).

McDonald also implicated Roa in the scheme. Roa first informed him that he had to miss a month's dues so that he could not run in an election. Tr. at 294. McDonald, in his 1996 testimony described this conversation with Roa as follows:

> [The Business Agents] have to miss within the last 24 months, and Paul Roa is the one that goes around—well, he's the guy now . . . . He tells everybody, 'You have to miss a month's dues.'
>
> And I said to him, 'Why is that, Paul?'
>
> And he said, 'So you're not a threat to Eddie.'
>
> I said, 'What do you mean, a threat?'
>
> And he goes, 'Well then you won't be eligible to run in the next election if you miss your dues.'

IRB-Ex. 1 (at E. 11).

Ruff also involved Roa in the scheme. At the end of 1995, Roa assumed the role of enforcing the missed dues policy, and Roa came into Ruff's office at the Local and advised him that one of Boardman's responsibilities he had been given was to require the Business Agents to miss their monthly dues payments. (Tr. at 176).

Roa's protest that he was not involved in the scheme to force Business Agents to make late payments is not credible. At the hearing before us, Roa denied that he had ever assisted in or supervised a scheme that required Business Agents to miss their dues. *Id.* at 558. Indeed, he claimed he was unaware of the existence of that scheme. *Id.* at 559. From the documentary evidence of the TITAN records and his prior sworn examination testimony to the contrary, IRB-Ex. 1 (at E. 3), Roa's denial of the existence of the scheme is difficult to accept.

Roa also claimed that he did not know how to read a TITAN printout. *Id.* at 564. The printout reflected that Roa had missed paying his dues on only two occasions from January 1993 to the present, when Roa paid his dues for June 1994 on July 13, 1994 and when Roa paid his dues for February 1997 on March 20, 1997. (Ex. CI-25). These were in two different election eligibility periods, corroborating his involvement in the scheme. Roa acknowledged that the TITAN printout reflected he was on dues check-off for January 1990. He nonetheless thought he was on self-pay. (Tr. at 566). Once on self-pay, after he missed the dues payments, Roa did not ask Mireles to put him on dues check-off. *Id*, at 579.

Roa had previously testified in 1998 that Business Agents at Local 952 had discussed in 1996 that they were required to miss a monthly dues payment within the 24 months prior to the Local officer election. IRB-Ex. 1 (at E.3). At the hearing before us, Roa initially denied having any discussion with Boardman on this subject. Tr. at 570. Subsequently, Roa admitted Boardman told him Bob Marciel, a Teamster official at another Local, had a policy that Business Agents at another Local miss their dues. *Id.* at 571-573. Why they discussed Marciel when the scheme was rampant at their own Local, was unexplained. Again, we found Roa not a credible witness.

III. CONCLUSION

THE EVIDENCE ESTABLISHED JUST CAUSE TO FIND RESPONDENTS BROUGHT REPROACH UPON THE IBT AND VIOLATED TEE IBT

A. Mireles Required Local 952 Business Agents to Miss a Monthly Dues Payment as Charged

Through documentary evidence and testimony of current and former members of the Local, the Chief Investigator proved by the preponderance of the credible evidence the charge that Mireles required Business Agents and certain others to miss a monthly dues payment to make them ineligible for election.

The key to the scheme lay in what the Local 952 TITAN dues records reflect, that prior to 1990, the Local had followed a practice whereby the Local paid the monthly dues of its officers, Business Agents and employees through a dues check-off system. We have found that within three months of taking office as Secretary-Treasurer, Mireles changed the method of dues payment. The TITAN records reflected that by March 1990. the method of dues payment for the Local's Business Agents changed to a self-pay system, in which the individual Business Agent was required to make the monthly dues payment himself or herself. This enabled Mireles to then implement the missed dues scheme and enabled Mireles to monitor compliance with it by review of the TITAN records. These records reflect that from this change by March 1990, until the filing of these charges in November 1998 , with one exception, no Business Agent on the self-pay system was eligible to run in the 1992, 1995 and 1998 Local 952 Local officer elections.

As set forth above, the testimony of current and former Local 952 officers, Business Agents and clerical employees established Mireles' knowing role in the creation and implementation of this policy. The testimony of current and

former members of Local 952 clearly demonstrated this. The testimony of Boardman, Barnes, Smith, Ruff and Sevilla, Patton, McDonald, Frias, Sanzaro, King and Wiley is corroborated by the documentary evidence reflecting the change in the method of dues payment from dues check-off to self-pay and the missing of dues payments. Just by way of example, Mireles' knowledge of this policy was proved, among other evidence by Barnes' testimony that Mireles instructed her to remove all the Business Agents, with the exception of Boardman, from dues check-off and put them on self-pay; Boardman's testimony that Mireles directed him to issue instructions to the Business Agents placed on self-pay to miss a month's dues payment; Ruff's testimony that the required missing of dues payments was discussed in Mireles' presence, and that Mireles expressed his gratitude to Ruff for fighting with Sevilla when Sevilla attempted to evade the instructions to miss making a timely dues payment; Smith's testimony; Sevilla's testimony concerning Mireles' statements to him concerning Sevilla's failure to miss a month's dues payment; and, of course, the Local records which reflected that after Mireles became Secretary-Treasurer of Local 952 in 1990, only one non-officer Business Agent other than Boardman had been eligible to run in a Local Union officer election.

We find that Mireles did require Local 952 Business Agents to miss a dues payment as charged.

B. Mireles Failed to Cooperate with the IRB

The second IRB-recommended charge filed against Mireles alleged that Mireles failed to cooperate with the IRB, first by testifying falsely at his sworn IRB examination on October 18, 1996 concerning the Local's practice of requiring Business Agents to miss a monthly dues payment; and second, through encouraging Local officers and employees to lie to the IRB at their sworn IRB examinations in 1996.

There was abundant evidence of Mireles' failure to cooperate by giving false testimony not only at his 1996 examination, but also at his 1998 sworn IRB examination.[16] In his 1996 sworn examination, Mireles acknowledged that he had reviewed the TITAN printouts of the Business Agents and testified that the Local did not have a policy whereby Business Agents were required to miss a month's dues payment. IRB-Ex. 1 (at E. 1, pp. 124-125).

Mireles' testimony that he was unaware how the dues of the Business Agents were paid at the start of his administration, had not instructed anyone to remove the Business Agents from a dues check-off system to a self pay system, had not directed members of the Executive Board to be restored to the dues check-off system and was unaware of any policy whereby Business Agents of Local 952 were either encouraged to or required to miss a monthly dues payment was not credible in light of the control he exercised, the timing of the change, the timing of the late dues payments, and that only he and the officers of the Local benefited from the widespread is ineligibility of Business Agents and the continuation of the process through the 1998 Local 952 Local officer election cycle.

Finally, at one critical point after another Mireles' testimony was contradicted by the many witnesses called by the Chief Investigator, and the evidence also included testimony of Sevilla, Barnes, Frias and Smith that prior to the sworn examinations in 1996, Mireles approached each of them and instructed them to testify falsely at their 1996 sworn IRB examinations. In their subsequent testimony, each corroborated the other with respect to the matters under inquiry as to which they initially gave false testimony. Each of these matters concerned conduct of Mireles and Roa, as

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[16] The IBT hearing panel found that Mireles testified falsely at both his 1996 and 1998 sworn examinations. IRB-12 at 17-18.

opposed to conduct for which any of these individual members could face exposure. Each of these witnesses as an employee (or in Barnes' case, as a consultant) of the Local served at Mireles' pleasure and faced the threat of termination for failure to follow Mireles' instructions. In 1998, Sevilla, Barnes, Frias and Smith voluntarily came to the Chief Investigator's office and revealed Mireles scheme with a willingness to accept the consequences of their prior actions. Even with the self-interest that Mireles claims they had, and which we have observed, as political opponents, their testimony is corroborated by the testimony of others, the TITAN records and even one of Mireles' witnesses, Patton.

We thus find that Mireles did himself testify falsely and also encouraged others to lie in their examination in 1996.

C. Roa Required Business Agents To Miss Making Timely Dues Payments

As set forth above, the testimony of Boardman, Barnes, Ruff, Sevilla, Wiley, Patton, King, McDonald, Sanzaro, and Frias established that Mireles implemented and maintained a scheme which required Business Agents not on dues check-off to miss a monthly dues payment to ensure ineligibility. The testimony of Sanzaro, Boardman, Ruff, Sevilla, Barnes, Smith, McDonald and Roa himself established that beginning in 1996 Roa enforced Mireles' requirements after Boardman left the Local. Roa' s claim in his IRB hearing testimony that he was unaware of the existence of a policy requiring missed dues payments is refuted by his prior testimony, his conduct reflected in the documentary evidence and the common knowledge of the scheme by Local employees. Roa's knowledge of this scheme is reflected by his testimony that Boardman had earlier told him to miss his dues; and by the TITAN records which reflected that Roa had missed paying his dues on only two occasions from January 1993 to the present, when Roa paid his dues for June 1994 on July 13, 1994 and when Roa paid his dues for February 1997 on

March 20, 1997. Ex. CI-25. This was the bare minimum required to ensure his ineligibility in both Local elections.

In contrast to Roa's blanket denials, the testimony of Sanzaro, McDonald, Ruff, Smith and Sevilla corroborated one another with respect to Roa's role in telling Business Agents to miss a monthly dues payment to insure their ineligibility for Local office under Mireles' scheme.

Finally, as with Mireles, we observed Roa as he testified before us and found him to lack credibility. We find on the charge against Roa that, at the direction of Mireles, he required Business Agents to miss making timely monthly dues payments so as to make them ineligible for voting in Local 952 elections.

IV. SANCTIONS

Based on the foregoing, the evidence established that Mireles and Roa brought reproach upon the IBT. Accordingly, we are imposing the following sanctions:

1. Mireles is barred from holding the position as an officer in the IBT or any related entity for a period of seven years and he is suspended from IBT membership for a period of four years.

2. Roa is barred from holding the position as an officer in the IBT or any related entity for a period of four years and he is suspended from IBT membership for a period of two years.

Members of the Independent
Review Board

/s/ Grant Crandall

/s/ Frederick B. Lacey

/s/ William H. Webster

Dated: October 17, 2000

APPENDIX D

29 U.S.C. § 411(a)(1). *Equal Rights.*

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(2). *Freedom of Speech and Assembly.*

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 412. *Civil action for infringement of rights; jurisdiction.*

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

29 U.S.C. § 529. *Prohibition on Certain Discipline by Labor Organization.*

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

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No. 02-1099

In the Supreme Court of the United States

ED J. MIRELES AND PAUL J. ROA, PETITIONERS

v.

UNITED STATES OF AMERICA
AND CHARLES M. CARBERRY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a consent decree entered into by union officials and the United States provides authority for imposing sanctions against union officials for actions that bring reproach upon the union.

2. Whether the court of appeals correctly applied the substantial evidence standard.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-7a) is reported at 315 F.3d 97. The opinion of the district court (Pet. App. 8a-13a) is unreported. The opinion of the Independent Review Board (Pet. App. 14a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2002. The petition for a writ of certiorari was filed on January 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 28, 1988, the United States filed an action under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964, against the International Brotherhood of Teamsters (IBT), its General Executive Board, the eighteen members of the General Executive Board, the Commission of La Cosa Nostra, and various members and associates of La Cosa Nostra. *United States* v. *International Bhd. of Teamsters*, 931 F.2d 177, 180 (2d Cir. 1991) (*1991 Election Rules Order*). The Government sought extensive equitable relief to eradicate criminal influence over the IBT. *Ibid.*

A consent decree approved by the district court on March 14, 1989 (the Consent Decree), resolved the government's claims against the IBT defendants. *1991 Election Rules Order*, 931 F.2d at 179. The Consent Decree instituted structural reforms of the IBT's electoral and disciplinary processes in order to eradicate criminal influence over the union. The Consent Decree requires "that the IBT * * * be maintained democratically, with integrity and for the sole benefit of its members without unlawful outside influence." *United States* v. *International Bhd. of Teamsters*, 803 F. Supp. 761, 767 (S.D.N.Y. 1992) (*IRB Rules*), aff'd as modified, 998 F.2d 1101 (2d Cir. 1993).

The Consent Decree fundamentally restructured the IBT's electoral system to provide for direct, secret-ballot, rank-and-file election of the union's top officers in a process supervised by a court-appointed Election Officer. *IRB Rules*, 803 F. Supp. at 767, 770. The IBT's initial rank-and-file election pursuant to the Consent Decree was held in 1991. After certification by the Election Officer of the results of that election, the

Consent Decree provided for the establishment of an Independent Review Board (IRB). *Id.* at 800.

"The IRB is a permanent institution vested with power to investigate and eradicate corruption, and to monitor the IBT's attempts to eradicate corruption." *IRB Rules*, 803 F. Supp. at 780. The three-member IRB possesses broad investigatory and disciplinary powers. In particular, the Consent Decree provides that the IRB "shall exercise such investigative authority as the General President and General Secretary-Treasurer are authorized and empowered to exercise pursuant to the * * * IBT Constitution, as well as any and all applicable provisions of law." *Id.* at 802. The IRB may investigate, *inter alia*, allegations of offenses under the IBT Constitution including interference with the right of union members to "seek election to office" and any "conduct that in the IRB's view brings reproach upon the Union." *Ibid.*

2. Petitioner Ed J. Mireles served as Secretary-Treasurer and principal officer of IBT Local 952 from 1989 until 1999. After his election in 1989, Mireles instituted a policy at the local that required IBT members who served as business agents for the union, as a condition of their employment, to render themselves ineligible to run for office against him.[1] To be eligible to seek election to an office, an IBT member must remain in continuous good standing for two years, which requires, *inter alia*, the timely payment of monthly membership dues. Mireles required the business agents, upon penalty of termination, to miss a

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[1] Business agents serve a local union by "participat[ing] in the negotiating of collective-bargaining agreements, organizing * * * union members, and processing * * * grievances." *Finnegan* v. *Leu*, 456 U.S. 431, 434 (1982).

timely dues payment at least once within the 24-month period preceding nominations for the next local union election. Pet. App. 2a, 16a.

Mireles sought to disqualify business agents from seeking elective office because they represented the only realistic challenge to the incumbent leadership. Ensuring the disqualification of business agents therefore would allow Mireles and his executive board to maintain control over the union in perpetuity. Petitioner Paul J. Roa assisted Mireles in the scheme by informing the business agents that they would be fired if they did not comply with Mireles's policy. Pet. App. 46a-49a.

3. On October 22, 1998, the IRB recommended that the union bring disciplinary charges against Mireles and Roa on the basis that the dues scheme "brought reproach on the IBT in violation of * * * the IBT Constitution." Pet. App. 14a, 16a. After the union held hearings on the charges, the IRB held hearings and reviewed the matter *de novo*. *Id.* at 17a-18a.

On October 17, 2000, the IRB issued a decision sustaining the charges against both Mireles and Roa. Pet. App. 14a-50a. The IRB found that Mireles, who had testified in person at the IRB hearing, "did himself testify falsely and also encouraged others to lie." *Id.* at 49a. The IRB concluded that "the testimony of current and former Local 952 officers, Business Agents and clerical employees established Mireles's knowing role in the creation and implementation" of the scheme. *Id.* at 46a. The IRB found that the testimony of those witnesses was corroborated by computer records establishing that officers, business agents, and employees of the local paid their dues through an automatic check-off system before 1990, but that the method of dues payment for business agents changed to a self-payment

system within three months after Mireles assumed office. That change, the IRB determined, "enabled Mireles to * * * implement the missed dues scheme and * * * to monitor compliance with it." *Ibid.* The computer records confirmed that, with one exception, "no Business Agent on the self-pay system was eligible to run in the 1992, 1995, and 1998 Local 952 Local officer elections." *Ibid.*

After reviewing the evidence establishing Mireles's role in the scheme, the IRB determined:

> Mireles' testimony that he was unaware how the dues of the Business Agents were paid at the start of his administration, had not instructed anyone to remove the Business Agents from a dues check-off system to a self pay system, had not directed members of the Executive Board to be restored to the dues check-off system and was unaware of any policy whereby Business Agents of Local 952 were either encouraged to or required to miss a monthly dues payment was not credible in light of the control he exercised, the timing of the change, the timing of the late dues payments, and that only he and the officers of the Local benefited from the widespread * * * ineligibility of Business Agents and the continuation of the process through the 1998 Local 952 Local officer election cycle.

Pet. App. 48a. The IRB also "observed Roa as he testified * * * and found him to lack credibility." *Id.* at 50a.

The IRB sanctioned Mireles by suspending him from IBT membership for four years and barring him from holding a union office for seven years. Pet. App. 50a. The IRB suspended Roa from membership for two

years and barred him from holding a union office for four years. *Ibid.*

4. a. In accordance with the Consent Decree and IRB Rules, the IRB submitted its decision to the district court for entry as an order. Pet. App. 8a. On February 21, 2001, the district court issued an opinion upholding the IRB's decision. *Id.* at 8a-13a.

b. The court of appeals affirmed. Pet. App. 1a-7a. The court first rejected petitioners' contention that the IRB lacked jurisdiction to impose sanctions against them because their scheme did not violate the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 401 *et seq.* The court explained that "the scope of the IRB's power under the Consent Decree is not limited to violations of federal labor or criminal law"; instead, the Consent Decree empowers the IRB to proscribe conduct that "brings reproach upon" the union in violation of the IBT Constitution. Pet. App. 4a. The court added that, while petitioners rely on decisions holding that business agents who retain their rights as union members after discharge have no LMRDA cause of action, the issue in this case is "whether the conditioning of union employment on relinquishment of a membership right brought reproach upon the union." *Id.* at 5a.

The court also held that substantial evidence supported the IRB's findings that petitioners' conduct brought reproach upon the union. Pet. App. 6a-7a. After reviewing the evidence relied upon by the IRB, including the testimony of numerous witnesses and the evidence from the computer records, the court explained that petitioners' actions "secretly narrowed the field of possible officers, partially insulated an office-holder from challenge, and thereby impaired the system of open competitive election to union office." *Id.* at 7a.

Petitioners' scheme, the court concluded, was "enough to bring reproach upon the union." *Ibid.* The court rejected petitioner' arguments concerning the credibility and weight of certain testimony, explaining that the IRB is "best equipped to evaluate the demeanor, credibility, and ultimately the culpability of those who appear before them." *Ibid.* (quoting *United States* v. *International Bhd. of Teamsters*, 247 F.3d 370, 380 (2d Cir. 2001)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners renew their argument (Pet. 5-15) that their scheme did not violate the LMRDA and that the IRB therefore lacked jurisdiction to impose sanctions against them. Petitioners assert that the decision of the court of appeals conflicts with the interpretation of the LMRDA adopted in this Court's decision in *Finnegan* v. *Leu*, 456 U.S. 431 (1982), and in two decisions of other courts, *Bloom* v. *General Truck Drivers*, 783 F.2d 1356 (9th Cir. 1986), and *Screen Extras Guild, Inc.* v. *Superior Court*, 800 P.2d 873 (Cal. 1990). Petitioners' arguments lack merit.

In *Finnegan*, this Court held that the LMRDA does not bar an elected union official from terminating appointed business agents so long as the agents' rights as union members are not infringed. 456 U.S. at 435-442. The Court explained that the "Act's overriding objective was to ensure that unions would be democratically governed" and "responsive to the will of the union membership," and that "the ability of an elected union president to select his own administrators is an integral

part of ensuring a union administration's responsiveness to the mandate of the union election." *Id.* at 441. In *Screen Extras Guild*, the California Supreme Court, applying *Finnegan*, concluded that the LMRDA preempted a former business agent's state law claim of wrongful discharge. 800 P.2d at 882. And in *Bloom*, which also involved a wrongful discharge action brought by a former business agent, the Ninth Circuit held that the particular action at issue was not preempted by the LMRDA, 783 F.2d at 1362, but observed that the LMRDA generally reflects a federal interest in permitting elected union leaders to replace incumbent union administrators, *id.* at 1361-1362.

The issues concerning the LMRDA addressed in *Finnegan*, *Bloom*, and *Screen Extras Guild* have no relevance to the IRB's enforcement of the Consent Decree in this case. As the court of appeals correctly explained in rejecting petitioner's reliance on those decisions, the IRB's exercise of jurisdiction "is not limited to violations of federal labor law but is instead, under the Consent Decree, coextensive with that of the IBT General President and General Secretary-Treasurer." Pet. App. 5a. The Consent Decree vests the IRB with authority "'to interpret and apply' the IBT Constitution and 'to decide all questions of law thereunder.'" *Id.* at 3a (quoting *United States* v. *International Bhd. of Teamsters*, 905 F.2d 610, 619 (2d Cir. 1990)). One of those questions is whether a union member or officer has engaged in conduct that "brings reproach upon" the union. Pet. App. 4a. Because the IRB's jurisdiction in this case is validly premised upon the Consent Decree, decisions addressing whether a business agent's termination violates the LMRDA or whether a wrongful discharge action is preempted by

the LMRDA—the issues discussed in *Finnegan*, *Screen Extras Guild*, and *Bloom*—are inapposite.[2]

Moreover, petitioners err in asserting (Pet. 6-9, 11-15) that their conduct constituted protected LMRDA activity under *Finnegan*, *Screen Extras Guild*, and *Bloom*. This Court explained in *Finnegan* that the LMRDA ensures the responsiveness of unions to the will of the membership "as expressed in open, periodic elections," and that the statute thus permits an elected representative to choose his own union staff. 456 U.S. at 441. This case, however, does not involve the prerogative of an elected union officer to appoint an administration after an election. Instead, it involves petitioners' efforts to deny union members the ability to challenge the incumbent leadership democratically in an election.

As a result, whereas *Finnegan* is premised on the notion that the LMRDA protects only the rights of membership in a union rather than employment by a union, 456 U.S. at 436-438, petitioners' conduct in denying union members the opportunity to seek elected office amounted to the forced "relinquishment of a membership right." Pet. App. 5a. Neither *Finnegan*, *Bloom*, nor *Screen Extras Guild* involved the denial of union membership rights, and none of those decisions suggests that petitioners' conduct is insulated from a finding that it brought reproach upon the union in violation of the IBT Constitution.

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[2] The district court decision relied upon by petitioners (Pet. 9) (citing *Parini* v. *International Bhd. of Teamsters*, 568 F. Supp. 1246 (N.D. Ill. 1983), aff'd, 749 F.2d 34 (7th Cir. 1984)), is likewise inapposite because it concerned an LMRDA claim and not a claim based on the IBT Consent Decree.

2. Petitioners contend (Pet. 15-24) that the holding of the court of appeals that the IRB's decision is supported by substantial evidence conflicts with the opinion of the Sixth Circuit in *Department of Labor* v. *Congleton*, 743 F.2d 428 (1984). In *Congleton*, which involved a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, the Sixth Circuit explained that a decision of an administrative law judge to credit certain testimony was not supported by substantial evidence because it failed to provide reasons for crediting the testimony and ignoring contrary evidence. 743 F.2d at 429-430. Petitioner argues (Pet. 17-24) that the IRB's decision in this case similarly lacks substantial evidentiary support because the IRB failed to provide non-conclusory reasons for crediting the testimony of certain witnesses. That fact-bound contention does not warrant review.

Moreover, the IRB's comprehensive opinion and findings (Pet. App. 14a-50a) contains explanations of the reasons for crediting certain testimony. See, *e.g.*, *id.* at 31a ("[W]e credit [the Office Manager of Local 952, Ms. Barnes'] testimony given to the Chief Investigator in 1998 in that it draws support from other testimony and the TITAN [computer] records."); *id.* at 35a ("We accept Smith's testimony as credible notwithstanding her false testimony in 1996 [because] Smith explained why she lied in 1996. It was out of fear of Mireles."); *id.* at 48a (discussing credibility of Mireles in detail). The IRB's decision also addresses the contrary evidence. See, *e.g.*, *id.* at 40a ("As with [Mireles and Roa's witness] Ashley, we determined we could not credit Fitzgerald's testimony. It was unsupported by anyone. Moreover, it was at odds with the credible evidence we found supported the charges."). The court of appeals therefore correctly concluded that the IRB's decision to

discredit petitioners' testimony and to credit the testimony and evidence implicating petitioners was supported by substantial evidence. That factual determination does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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